

Case No. 198
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1925

No. 198

**JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L.
STIX, ET AL., ETC., PETITIONERS,**

vs.

PHILADELPHIA WAREHOUSE CO.

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR HABEAS CORPUS FILED AUGUST 11, 1925

HABEAS CORPUS GRANTED OCTOBER 13, 1925

(31,403)



(31,403)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 680

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L.
STIX, ET AL., ETC., PETITIONERS,

vs.

PHILADELPHIA WAREHOUSE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK**

PHILADELPHIA WAREHOUSE Co., Plaintiff in Error,
against

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX, CARL Seeman, and Frederick R. Seeman, Co-partners, Doing Business under the Firm Name and Style of Seeman Brothers, Defendants in Error.

STATEMENT UNDER RULE 234, C. P. A.

This action was commenced on the 12th day of April, 1921, by the service of summons and complaint on the defendants. The amended answer was served on the 17th day of October, 1923, pursuant to an order which provided that this case should maintain its place upon the calendar.

The names of the parties are given in full above. There has been no change in parties pending the suit.

Leventritt, Riegelman, Carns & Goetz are now attorneys for the plaintiff, and Cohen, Cole & Weiss are now attorneys for the defendants.

[fol. 2] Citation, in usual form, omitted in printing.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 6th day of April [fol. 4] in the year one thousand nine hundred and twenty-one.

— — —, Clerk. (Seal.) Riegelman, Carns, Leventritt & Goetz, Plaintiff's Attorney-.

Office and P. O. Address: 128 Broadway, Borough of Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

Plaintiff, by Riegelman, Carns, Leventritt & Goetz, its attorneys, complaining of the defendants, alleges, upon information and belief:

First. Plaintiff is a corporation organized and existing [fol. 5] under and pursuant to the laws of the Commonwealth of Pennsylvania.

Second. Defendants were at all the times hereinafter mentioned, co-partners doing business under the firm name and style of Seeman Brothers, and residents of the State of New York.

Third. At all the times hereinafter mentioned the Yorke Warehouse & Storage Co., Inc., a corporation organized and existing under and pursuant to the laws of the State of New York, was and still is engaged in business as warehousemen, operating a public warehouse as such at Nos. 686-690 Greenwich Street, and 697-701 Greenwich Street, in the Borough of Manhattan, New York City.

Fourth. At all the times hereinafter mentioned Anthony J. Coccaro and Joseph J. Coccaro were co-partners, doing business under the firm name and style of A. J. Coccaro & Co.

Fifth. On or about and between the 8th day of November, 1919, and the 5th day of January, 1920, the plaintiff herein

entered into written agreements with the said firm of A. J. Coccaro & Co., constituted as aforesaid, by the terms of which the plaintiff agreed to advance its credit to the said firm of A. J. Coccaro & Co., through the delivery of its promissory notes to the said firm of A. J. Coccaro & Co. In consideration thereof the said firm of A. J. Coccaro & Co., constituted as aforesaid, agreed to pay to the plaintiff the said several sums represented by the said notes of the plaintiff, at or before the maturity thereof, and further agreed, as security for the payment of the amounts so agreed to be paid to the plaintiff, simultaneously with said [fol. 6] several advances of credit, to pledge with the plaintiff certain merchandise.

Sixth. Pursuant to the said agreements between the plaintiff and the said firm of A. J. Coccaro & Co., the plaintiff procured on its credit, as aforesaid, from time to time, certain sums of money in excess of Ninety Thousand Dollars (\$90,000) as aforesaid, for the said firm of A. J. Coccaro & Co., of which moneys a sum in excess of Fifty-nine thousand dollars (\$59,000) is now past due and no part of which has been paid by said firm of A. J. Coccaro & Co., although duly demanded.

Seventh. Pursuant to one of the aforesaid agreements made on the 18th day of November, 1919, the said firm of A. J. Coccaro & Co. deposited nine hundred ninety-nine (999) cases of "Blue Boy" Salmon, as hereafter more fully described, with the plaintiff, simultaneously with an advance of credit in the sum of Fifty-nine hundred dollars (\$5,900) and the agreement for the payment thereof, and as security therefor, and inter alia as security for other advances made and to be made.

Eighth. The said 999 cases of "Blue Boy" Salmon were on or about the said 18th day of November, 1919, in transit, consigned to the firm of A. J. Coccaro & Co., and on said date were pledged by the said firm of A. J. Coccaro & Co. to the plaintiff as aforesaid, by the endorsement by said A. J. Coccaro & Co., to the plaintiff of a certain bill of lading issued by a common carrier therefor, which said bill of lading was delivered to the Yorke Warehouse & Storage Co., Inc., by the plaintiff, and in exchange therefor the said [fol. 7] Yorke Warehouse & Storage Co., Inc., issued to the

plaintiff its non-negotiable warehouse receipt No. 873, dated November 22nd, 1919. The said Yorke Warehouse & Storage Co. Inc., delivered the said bill of lading to the said common carrier and received the said merchandise and deposited the same in its warehouse as aforesaid.

Ninth. Plaintiff at all times hereinbefore mentioned had and still has title to said merchandise and was and still is the holder of said non-negotiable warehouse receipt.

Tenth. Thereafter the defendants did, without the knowledge and consent of the plaintiff, take possession of the said 999 cases of "Blue Boy" Salmon, and did dispose of the same for their own account and convert the same to their own use; and upon demand therefor, did fail and neglect to deliver the same to the plaintiff.

Eleventh. By reason of the premises, plaintiff has been damaged in the sum of \$8,000, no part of which said sum has been paid, although duly demanded.

Wherefore, plaintiff demands judgment against the defendants and each of them in the sum of Eight Thousand dollars (\$8,000), with interest, besides the costs and disbursements of this action.

Riegelman, Carns, Leventritt & Goetz, Attorneys for Plaintiff.

Office and P. O. Address: 128 Broadway, Borough of Manhattan, New York City.

[fol. 8] *Duly sworn to by William P. Cosgrove. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER

Defendants, by Cohen, Cole & Weiss, their attorneys, for an amended answer to the complaint herein:

First. Deny any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "First" "Third," "Fourth," "Fifth,"

"Sixth," "Seventh," and "Eighth" of the complaint herein.

Second. Deny each and every allegation contained in paragraph- "Second" and "Ninth" of the complaint.

Third. Admit that they took possession of certain cases of Blue Boy Salmon and disposed of same and have not delivered any cases of salmon to the plaintiff, but deny that they have any knowledge or information thereof sufficient to form a belief as to whether said salmon is the salmon re-[fol. 10] ferred to in the complaint herein; and deny each and every other allegation contained in paragraph "Tenth" of the complaint.

Fourth. Admit that they have not paid to the plaintiff any part of the sum of Eight Thousand (\$8,000.00) Dollars and that plaintiff has demanded payment thereof, but deny each and every other allegation contained in paragraph "Eleventh" of the complaint.

For a first complete affirmative defense defendants allege:

First. Upon information and belief, that the loan and agreement alleged in the complaint to have been made between plaintiff and said firm of A. J. Coccaro & Co. were usurious and in violation of law in that they provided that said firm of A. J. Coccaro & Co. pay to plaintiff and plaintiff take and receive sums and value at a rate greater than \$6.00 upon each \$100.00 for one year and that sums and value aggregating more than \$6.00 upon each \$100.00 for one year were taken and received by plaintiff or secured and reserved by plaintiff and exacted of said firm of A. J. Coccaro & Co. directly and indirectly under color, among other things, of compensation for services alleged to have been rendered but actually as an addition to the rate of interest upon such loan, and that the property and documents alleged in the complaint to have been received by plaintiff from said firm of A. J. Coccaro & Co. were as security for such loan or loans upon which sums and values in excess of \$6.00 for each \$100.00 for one year were usuriously exacted by plaintiff from said A. J. Coccaro & Co. and paid or agreed to be paid by said firm of A. J. Coccaro & Co.

[fol. 11] to plaintiff for the loan of the moneys described in the complaint.

Second. That all property purchased by defendants from said firm of A. J. Coccaro & Co. was purchased in good faith and for valuable consideration and without any notice of any claim or claims or rights of the plaintiff in, to or concerning such property, or any property owned, held or claimed by said firm of A. J. Coccaro & Co.

For a second complete affirmative defense, defendants allege:

First: Reallege and reaffirm each and every allegation contained in paragraph Second of the first affirmative defense herein with the same force and effect as if set forth at length herein.

Second. Upon information and belief, that the property and bill of lading alleged in the complaint to have been transferred to plaintiff were not accompanied by an immediate delivery thereof at the time of the alleged loan or loans described in the complaint and were not followed by an actual and continued change of possession thereof.

Third. Upon information and belief, that neither the original agreement between plaintiff and said firm of A. J. Coccaro & Co. referring to said property and to said bill of lading, nor a true copy thereof, was filed either in the town or city where the members of the firm of A. J. Coccaro & Co. resided at the time, or in the town or city where said property was then situated, to wit, neither in the office of the Register of the County of Kings where the members of the said firm of A. J. Coccaro & Co. then re-[fol. 12] sided, nor in the office of the Register of the County of New York where said property was then located.

Fourth. Upon information and belief, that no sign containing the name of the plaintiff and its interest in said property, or designation of the plaintiff as lienor, factor or consignee, was placed and maintained at a conspicuous place at the entrance to the building or place in which such property was located, kept and stored, and no notice of lien stating the name of the plaintiff, its principal place of business within the State, the State under whose laws it

was organized, the name of the person creating the lien and the interest of such person in the property, as far as known to the plaintiff, the general character of the property subject to the lien or which may become subject thereto, and the period of time during which such loans or advances may be made under the terms of the agreement creating the lien, was filed in the office of the Register of the County of New York in which county the property was then located, kept and stored.

Wherefore defendants demand judgment dismissing the complaint herein with costs.

Cohen, Cole, & Weiss, Attorneys for Defendants.

Office & P. O. Address: #61 Broadway, Borough of Manhattan, New York City, N. Y.

Duly sworn to by Joseph Secman. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S BILL OF PARTICULARS

SIRS: Please take notice, that the following is a bill of particulars of the plaintiff's claim herein, served in pursuance of your demand:

[fol. 14] 1. Upon information and belief, all of the agreements mentioned in paragraph "Fifth" of the complaint, between the plaintiff and A. J. Coccoaro & Co., were in writing, and hereto annexed are full and true copies of each and every of said agreements, together with several letters of even date therewith, authorizing the sale of plaintiff's notes and the said several agreements of and for extension of credit advances:

(a) Philadelphia, Pa., November 8, 1919, credit advance extended January 7, 1920; March 9, 1920, and May 7, 1920;

(b) Philadelphia, Pa., November 12, 1919, credit advance extended January 12, 1920; March 12, 1920; May 11, 1920;

(c) Philadelphia, Pa., November 18, 1919, credit advance extended January 20, 1920; March 23, 1920;

(d) Philadelphia, Pa., November 18, 1919, credit advance extended January 20, 1920; March 23, 1920;

(e) Philadelphia, Pa., December 31, 1919, credit advance extended March 2, 1920; May 13, 1920;

(f) Philadelphia, Pa., January 5, 1920, credit advance extended March 5, 1920; May 4, 1920.

2. Upon information and belief, annexed hereto is a statement of the credit advances made to A. J. Coccaro & Co., by the plaintiff, the times when and the amount of payments received by the plaintiff on account thereof, the balances [fol. 15] owing thereon, to which must be added the interest from their respective due dates, marked "g."

3. Upon information and belief, the agreement under which a deposit of 999 cases of "Blue Boy" or "Boy Blue" Salmon was made with the plaintiff by A. J. Coccaro & Co., was in writing, and a full, true and complete copy thereof is hereto annexed, marked "c"; said Salmon was deposited with the plaintiff on November 18, 1919 by the delivery to the plaintiff by A. J. Coccaro & Co., of the order bill of lading issued by the Northern Pacific Railroad at Seattle, Washington, on October 22, 1919, duly endorsed by A. J. Coccaro & Co., said Salmon being then in transit to New York, N. Y., a full, true and complete copy of which bill of lading is hereto annexed, marked "h1" and "h2."

4. Upon information and belief, annexed hereto are full, true and complete copies of the bill of lading referred to in paragraph "Eighth" of the complaint, marked "h1" and "h2," and the non-negotiable warehouse receipt referred to in said paragraph of the complaint marked "i"; the said merchandise was received by the Yorke Warehouse & Storage Co., on or about November 22, 1919.

5. Upon information and belief, the defendants took possession of the said 999 cases of "Blue Boy" or "Boy Blue" Salmon on or about February 18, 1920 and at various times between February 18, 1920 and March 31, 1920, removed the same from the Yorke Warehouse & Storage Co., but the plaintiff is not able to state the times when the defendants

disposed of the same; a full, true and complete copy of the demand mentioned in paragraph "Tenth" of the complaint [fol. 16] is hereto annexed, marked "J"; the defendants without the knowledge or consent of the plaintiff took possession of the said 999 cases of "Blue Boy" or "Boy Blue" Salmon on or about February 18, 1920, and removed the same from the Yorke Warehouse & Storage Co., at various times between February 18, 1920 and March 31, 1920, but the plaintiff is not able to state when or the manner in which the defendants disposed of the same.

Dated New York, May 31, 1922.

Yours, etc., Riegelman, Carns, Leventritt & Goetz,
Attorneys for Plaintiff.

Office and P. A. Address: 128 Broadway, Borough of Manhattan, City of New York.

To Goldsmith, Cohen, Cole & Weiss, Attorneys for Defendants, Office and P. O. Address, 61 Broadway, Borough of Manhattan, City of New York.

(In the following, by plaintiff's exhibit 41—A-A, etc., is meant the papers offered in evidence by the plaintiff at the trial of this action and so marked. They are printed at the end of the bill of exceptions.)

Exhibit A is plaintiff's exhibits 41-A-A, 41-B-A and 41-C-A.

Exhibit B is plaintiff's exhibits 41-A-B, 41-B-B and 41-C-B.

[fol. 17] Exhibit C is plaintiff's exhibits 21, 22, 30 and 36.

Exhibit D is plaintiff's exhibits 41-A-C, 41-B-C and 41-C-C.

Exhibit E is plaintiff's exhibits 41-A-E, 41-B-E and 41-C-E.

Exhibit F is plaintiff's exhibits 41-A-F, 41-B-F and 41-C-F.

Exhibit G is plaintiff's exhibit 40.

Exhibit H is plaintiff's exhibit 23.

Exhibit I is plaintiff's exhibit 2.

Exhibit J is the following letter:

March 11, 1921.

Seeman Brothers, 121 Hudson Street, New York City.

GENTLEMEN: We write on behalf of our client, the Philadelphia Warehouse Company, with reference to 999—1/48 cases of "Blue Boy" Salmon which you removed from the warehouse of the Yorke Warehouse & Storage Co., Inc., between February 20, 1920, and March 26, 1920.

We hereby inform you that said merchandise was at the time of said purchase and/or removal from the warehouse of the Yorke Warehouse & Storage Co., Inc., the property of the Philadelphia Warehouse Company, and we hereby make demand upon you for the possession of the said merchandise, or in lieu thereof, we demand that you pay the Philadelphia Warehouse Company the sum of Eight thousand dollars (\$8,000).

In the event of your failure to comply with our demand, we are instructed to institute suit against you, on account [fol. 18] of said conversion, to recover the damages suffered by our client thereby.

Very truly yours, Riegelman, Carns, Leventritt & Goetz, by N. S. Goetz. NSG/J.

Duly sworn to by William P. Cosgrove. Jurat omitted in printing.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—November 13, 1923

We, the undersigned jurors impaneled in the above entitled case, find a verdict for the defendant:

1. Claude Hilton. 2. Henry Bradley. 3. Howard F. Almy. 4. Albert S. Frank. 5. J. Edward Baum. 6. Moses H. Ackerley. 7. E. John Affakran. 8. Jerome M. Bell. 9. C. W. Wolfin. 10. — — —. 11. William O. Mara. 12. — — —.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRIES

Now comes the plaintiff by Leventritt, Riegelman, Carns & Goetz, its attorneys, and David L. Podell, of counsel, and moves the trial of this cause. Likewise come the defendants by Cohen, Cole & Weiss, their attorneys, and Samuel F. Frank, of counsel. Thereupon a jury is duly impaneled and sworn and the cause proceeds to trial. After hearing the evidence for the respective parties, the argument of counsel and the charge of the court, the jury, on Tuesday, November [fol. 21] ber 13, 1923, retire in the charge of an officer duly qualified to attend them.

Ordered, sealed verdict.

Sealed verdict rendered.

Thereafter, on Wednesday, November 14, 1923, sealed verdict opened and recorded in the presence of the jury as follows:

Verdict for the defendants.

Pl'ff's atty. moves to set aside the verdict.

Decision reserved.

Thereafter, on December 28, 1923, motion to set aside the verdict and for a new trial denied.

An extract from the minutes.

Alexander Gilchrist, Jr., Clerk. (Seal.)

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL—December 28, 1923

The above-entitled action having been duly tried before me and a Jury at a trial term of this Court on the 7th, 8th, 9th, 12th 13th and 14th days of November, 1923, and the Jury having rendered a verdict therein in favor of the defendants, and the attorney for plaintiff having thereupon, and at the same time, duly moved upon the minutes of the Judge presiding at the trial to set aside the verdict so

rendered and for a new trial upon the exceptions and upon the ground that the verdict was contrary to law, contrary to the evidence and contrary to the weight of evidence, [fol. 23] Now, after hearing David L. Podell, Esq., of counsel for plaintiff, in support of said motion, and Samuel Frank, Esq., and Harry J. Leffert, Esq., of counsel for defendants, in opposition thereto, it is,

On motion of Cohen, Cole & Weiss, attorneys for the defendants,

Ordered that the said motion be, and the same hereby is, in all respects denied.

J. W. Mack, U. S. D. J.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—December 31, 1923

The issues in this action having been regularly brought on for trial before the Hon. Julian W. Mack, Judge of this Court, and a Jury, at a trial term of this Court held on the 7th, 8th, 9th, 12th, 13th and 14th days of November, 1923, at the United States District Court for the Southern District of New York, at the Post-Office Building, and the plaintiff and the defendants having appeared by counsel and the issues having been tried, and the Court having directed the Jury to render a sealed verdict and they, after due deliberation, having duly brought into Court and rendered such verdict on November 14, 1923, for all of the defendants, which verdict has been duly recorded, it is

Ordered and adjudged that the complaint in the above-entitled action be, and the same hereby is, dismissed on the merits of the action as against all the defendants herein, [fol. 25] and the costs having been duly taxed at the sum of \$62.60; it is further

Ordered and adjudged that the above-named defendants recover of the plaintiff, Philadelphia Warehouse Co., the sum of Sixty-two & 60/10 (\$62.60) — and that the defendants have execution therefor.

Alex Gilchrist, Jr., Clerk. (Seal.)

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions

APPEARANCES OF COUNSEL NOVEMBER 5, 1923

Riegelman, Carns, Leventritt & Goetz, Attorneys for Plaintiff; David L. Podell and Norman S. Goetz, of Counsel.

Goldsmith, Cohen, Cole & Weiss, Attorneys for Defendants; Samuel F. Frank and Harry J. Leffert, of Counsel.

A jury was impaneled and sworn.

Adjourned to Wednesday, November 7, 1923.

[fol. 27] New York, November 7, 1923.

Mr. Podell opened to the jury on behalf of the plaintiff.

Juror No. 10 was excused by agreement of counsel of both parties and the trial proceeded with 11 jurors.

Mr. Frank opened to the jury on behalf of the defendant.

ARTHUR R. SAMUT, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Samut, what is your occupation, please?

A. At present as an agent.

Q. What did you say?

A. At present, as an agent, Interborough Rapid Transit.

Q. Were you ever working for the Yorke Warehouse Company?

A. Yes, sir.

Q. And in what capacity were you working for them?

A. As a storage clerk.

Q. I cannot hear you.

A. Storage clerk.

Q. Storage clerk?

A. Yes, sir.

Q. What was the business of the Yorke Warehouse Company?

A. To store goods.

Q. Was it what is commonly known as a storage warehouse?

A. Storage warehouse, yes, sir.

Q. And what were your duties as storage clerk?

A. To see that everything comes in all right, and goes out all right, and keep the record as correct as I can.

Q. To see what? That everything comes in all right and what?

A. And goes out all right, and the same quantity, and [fol. 28] keep the records as clear as possible—as correct as possible.

Q. Keep the records as correct as possible?

A. Yes, keep the records as correct as possible.

Q. And were you doing that in November of 1919?

A. No. November, 1919?

Q. Yes, were you doing that in November, 1919?

A. Yes, already for some months.

Q. You had been doing it for some months?

A. For some months, already before November, yes.

Q. Do you recall a shipment of salmon coming into the warehouse?

A. I do.

Q. In November, 1919?

A. Yes.

Q. Did you personally have charge of the matter of storing that salmon, and of the matter of making the records?

A. Yes, sir.

Q. With regard to that shipment of salmon?

A. Yes, sir.

Q. Did you personally make entries in the books of account of the Warehouse Company with respect to that salmon?

A. All of them, yes, sir.

Q. I show you certain papers, and I ask you, Mr. Samut, whether you recognize the writing thereon (handing papers to witness)?

A. Yes, this is my handwriting.

Q. And what papers are those? Where are they from? Do you recognize them?

A. From the Yorke Warehouse Company.

Q. And the handwriting is your own, you say?

A. All of it, yes, sir.

Q. When did you write the things that appear on those papers?

A. Somewhere around May—the first days of May—the first half of May.

Q. Did you make any entries on any of those papers with respect to the shipment of salmon which you say came in [fol. 29] in November, 1919? To save time, just look at page 28, I am told, Mr. Samut—29.

A. Yes, on November 22nd.

Q. These are in your handwriting likewise?

A. Yes, this is in my handwriting.

Q. Can you, by refreshing your recollection from those papers, tell us what was the amount of salmon that was received at that time?

Mr. Frank: I would like to examine the witness before he answers that question.

Mr. Podell: I will withdraw it if you object to it, and admit that it is a valid objection up to this time.

Q. You made the entries on those papers yourself at that time?

A. Yes, sir, I did.

Q. Did you see the cases of salmon?

A. I see part of them when they were all in the warehouse.

Q. You did what?

A. I seen them when they were all in the warehouse.

Q. Were the employees that took charge of them, the men, under your supervision?

A. Yes.

Q. Did you personally examine the contents of any of those cases?

A. Only two.

Q. And what were those two?

A. There were some tins missing. One, I believe—yes, twenty-two cases.

The Court: Twenty-two what?

The Witness: Twenty-two tins missing of a case.

The Court: Twenty-two tins?

The Witness: Yes, sir.

Q. How many tins did you find in a case? I do not mean in the ones that had any missing; I mean in a case [fol. 30] that did not have any missing from it, how many were there supposed to be?

A. Those we never opened.

Q. I know, but you say there were a number missing—that you found some missing?

A. Yes.

Q. How many did you expect to find?

A. Forty-eight to a case.

Q. And how many did you find?

A. In one twenty-two.

Q. Look at the records.

A. One twenty-two short and one sixteen short.

Q. One twenty-two short and one sixteen short?

A. Yes.

Q. And those cases—did you always examine the shortages?

A. Yes, I always do.

Q. And that was called to your attention at the time?

A. I beg pardon?

Q. That was called to your attention at that time?

A. Yes, sir.

Q. And so you made the examination?

A. Yes, sir.

Q. Did you, thereafter, issue any document with respect to that salmon? Just answer that yes or no.

Mr. Frank: I object to that as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Frank: Exception.

Q. Just answer that yes or no.

A. Yes.

Q. Is the document which I show you now the paper that you issued at that time (handing paper to witness)?

A. Yes, I made this up.

Q. Now, were those entries on page 23 made by you in the regular course of your duties and your employment in the warehouse?

A. Yes, sir.

[fol. 31] Q. Were they made by you at the time when the cases were received in the warehouse?

A. The next day.

Q. And were they made by you upon information that you obtained by examination yourself, right then and there?

A. Yes.

Q. And were they true and correct entries made at that time?

A. There was an original entry of the checkers, from which I took it.

Q. And were those entries true and correct entries?

A. Correct entries.

Mr. Podell: Now I offer page 29 in evidence.

Mr. Frank: I would like to examine him a little on that.

By Mr. Frank:

Q. How long had you been employed by the warehouse at the time you made these entries?

A. I was employed from May 8, 1919, to September 18, 1920.

Q. And were you the bookkeeper there?

A. You could hardly call me a bookkeeper. Storage clerk was my work.

Q. Was there a bookkeeper there at that time?

A. There was.

Q. And was there a man who examined goods when they came in and went out?

A. I was practically in charge of that. Nobody had anything to say or to do with it.

Q. Was there such a man there who examined goods when they came in and went out, or were you that man?

A. I was that man.

Q. And were you the man also who kept the records in the office?

A. Yes.

[fol. 32] Q. Was there an office?

A. It was an office, yes.

Q. And on what floor was the office?

A. On the ground floor.

Q. And who else was in the office besides yourself?

A. There was a checking department, Mr. Polito, Mr. Kelly, and I think it is Freddie, an errand boy; and the

warehouse department, it was me, John Dougherty, a book-keeper. I cannot remember of anybody else.

Q. When cases came into the door, who was the man that stood there and tallied them or checked them? Was that you?

A. No, sir.

Q. Who did that?

A. That is O'Donnell, the checker.

Q. O'Donnell, the checker?

A. Yes.

Q. And when, in the regular course of business, was the first time that your attention would be called to any cases or boxes that came in?

A. Usually it would be my custom to go the next day and look at the whole lot, when it is in the warehouse, just to memorize the location.

Q. Did this warehouse go by memory, or did you go by a floor plan?

Mr. Podell: By what?

Mr. Frank: Floor plan.

The Witness: I don't understand you.

Q. Did you do this all by memory until the next day?

A. No, sir, I would have the records already there.

Q. Who was the person who indicated on what floor or in what part of the building or of the floor a lot of cases would go?

A. The checker would mark it in the original entry.

Q. And who was that?

A. O'Donnell.

[fol. 33] Q. And you would not see any of those cases until the next day?

A. Until the next day. I might see them the same day, but I don't think I have seen them in this case.

Q. Was there any original record made by the checker?

A. Yes.

Q. Where is that original record?

A. It must be with the records.

Q. You haven't got it there?

A. No, I haven't got it in my hand.

Q. Those boxes that you saw were closed and nailed shut?

A. Yes, outside of two.

Q. And they were tiered up?

A. Yes.

Q. That is, one on top of the other?

A. Yes.

Q. And you did not take down the tiers or go through the boxes, did you?

A. No, sir.

Q. And the only time you looked at any boxes was in case the wood was broken?

A. Of the two cases.

Q. I say, that is what brought your attention to those two particular cases?

A. Yes, sir, we are not supposed to look at the strong ones.

Q. But you did look at those?

A. I did, and we counted the tins.

Q. I am talking about the two broken ones.

A. Yes.

Q. But you did not look at the others?

A. I did look at the others, yes, on the floor the next day.

Q. Were they all laid out flat? How many cases were there?

A. No, just piled up.

Q. Have you been to the office of Mr. Podell in this case?

A. No, sir.

Q. Have you been to the office of the other attorneys for the plaintiff?

A. I have been in the office of Mr. Goetz.

[fol. 34] Q. How frequently were you in that office?

A. I think it is some twice or three times.

Q. In the last few days?

A. Probably the last month some time.

Q. Were you subpœnaed as a witness here?

A. Yes, sir.

Q. You were not subpœnaed to go to the attorney's office, were you?

A. Beg pardon?

Q. I say, you were not subpœnaed to go to the attorney's office, were you?

A. No.

Mr. Frank: I object to the offer in evidence of this document.

The Court: It may go in.

Mr. Frank: Your Honor will give me an exception?

The Court: Yes.

Paper marked Plaintiff's Exhibit No. 1.

By Mr. Podell:

Q. Counsel asked you whether you were in my office, and your answer was "No." What building were you in?

A. Oh, then I did not catch the name.

Q. "Mr. Podell's office," he said?

A. Oh, I see. Then I was at that office.

Q. My office is in the Woolworth Building.

A. Yes.

Q. How many times were you there?

A. Just once.

Q. And that was after you had appeared in court?

A. Yes, the last time I was in court.

Mr. Podell: The portion that is offered in evidence is page 29.

Q. Now, just keep that page before you, and tell us, [fol. 35] please, using that paper to refresh your recollection, how many cases of salmon were received in that shipment?

A. 999, according to the checkers.

Q. And when were they received?

A. November 22nd.

Q. And did you issue a warehouse receipt for them?

A. Yes, the one I just looked at.

Q. And is this in your handwriting (handing paper to witness)?

A. Yes, sir.

Q. Did you put a number down on your record—the number of that warehouse receipt?

A. Yes, I did.

Q. In the record, on page 29?

A. Yes.

Q. And what number was that?

A. 873.

Q. And did you put a like number on the warehouse receipt?

A. What number are you referring to?

Q. The number of the warehouse receipt itself is what?

A. Yes.

Q. What is the number of the warehouse receipt?

A. 873.

Q. And is that how your receipt was known, by that number?

A. Yes.

Q. No. 873?

A. 873.

Q. And to whom did you send this warehouse receipt?

A. To Philadelphia Warehouse Company.

Q. This is all in your handwriting?

A. All in my handwriting, yes.

Q. And did you make any reference to the shortages on your records, that you found?

A. Yes, I made a record of it.

Q. Did you likewise make a notation of the shortages on that warehouse receipt?

A. I did.

[fol. 36] Q. And is this the warehouse receipt that I show you now, that you issued at that time in the regular course of business, after you had made those entries bearing that number 873 (handing paper to witness)?

A. Yes, sir.

Mr. Podell: I offer the warehouse receipt in evidence.

Mr. Frank: Let me see it, please.

Mr. Podell: Yes (handing paper to Mr. Frank).

Mr. Frank: We object to it as incompetent, irrelevant and immaterial.

The Court: It may go in.

Mr. Frank: Exception.

Paper marked Plaintiff's Exhibit No. 2.

Mr. Podell: This, gentlemen, reads as follows: (Reading to the jury Plaintiff's Exhibit No. 2.)

Q. Can you state, Mr. Samut, whether you have made examination of your records to determine whether or not at that time, on November 22nd, there was any other salmon of any kind in the warehouse? Just answer whether you can state that yes or no.

Mr. Frank: I object to that as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Frank: Exception.

The Witness: Yes.

Q. When did you first take your job?

A. May 8th.

Q. Of what year?

A. 1919.

Q. When you took your job did you personally make an [fol. 37] inventory of the goods in there?

A. I did, sir.

Q. Did you find any salmon there at that time?

A. No.

Q. Since the time when you took your job, did you personally keep the records and supervise the receipt of merchandise in the warehouse?

A. Always.

Q. And did you make entries of goods as they were received throughout the period from May to November?

A. Yes, sir.

Q. And have you examined those entries that you made in the regular course of your business, to find whether or not on November 22nd there had been any salmon of any kind received in the warehouse?

A. There was not.

Mr. Frank: I object to it on the ground it is incompetent, irrelevant and immaterial, and is eliciting testimony as to the contents of records which are not produced.

The Court: He may answer.

Mr. Frank: Exception.

Q. What is your answer?

A. I have. There was none, according to the records.

Mr. Frank: I move that the answer be stricken out.

The Court: Overruled.

Mr. Frank: Exception.

Q. Now, did you likewise continue in your position until February 20th or 22nd of the following year?

A. 1920, yes, I was still there.

Q. Have you examined your records to find out whether or not between the receipt of these 999 cases of salmon and

[fol. 38] the time on February 22, 1920, there had been received any salmon at the warehouse?

A. No.

Mr. Frank: I object to that.

Mr. Podell: I consent to have his answer stricken out.

Mr. Frank: I object on the ground it is incompetent, irrelevant and immaterial, and attempting to offer proof of documents which are not here produced.

The Court: Read the question.

Q. (Read.)

The Court: He may answer.

Mr. Frank: Exception.

Q. Just first answer whether you have examined your records?

A. I did.

Q. Did you find that there had been any salmon received other than this shipment of November 22nd?

A. There were none.

Mr. Frank: I would like to have an exception to all this line of testimony, and all these questions.

The Court: Yes.

Q. You continued to hold the same position of storage clerk and to perform the same duties up to February 22, 1920, and beyond that time?

A. And beyond that, yes.

Q. And you made the entries that you have already stated, with respect to the receipt of goods in the same way after November and beyond February of 1920?

A. Yes, sir.

Mr. Podell: Now, will you be good enough to produce those receipts?

[fol. 39] (Papers handed to Mr. Podell by an associate.)

Mr. Podell: Mr. Frank may be good enough to stipulate as to the signatures on these receipts and orders (handing papers to Mr. Frank).

By Mr. Podell:

Q. Now, who was in charge of things at the warehouse?

A. I.

Q. Of the entire warehouse?

A. Yes, of all merchandise that comes in.

Q. You were in charge of merchandise that came in?

A. Yes.

Q. And did you know Mr. A. J. Coccaro?

A. Yes.

Q. What was his connection with the warehouse, as far as you knew?

A. Owner and boss.

Q. And did he give you orders from time to time?

A. Yes.

Q. And do you know his handwriting?

A. I do.

Q. I show you a paper and ask you whether—first, who is J. E. Scavone? Who is he?

A. He is a clerk at A. J. Coccaro & Co.'s.

Q. At the—

A. (Interrupting.) At the office, No. 1 Broadway.

Q. Did you know his handwriting?

A. Yes, sir.

Q. I show you a paper and ask you whether that bears the handwriting of Scavone (handing to witness)?

A. Yes, sir, that is his, with the exception of a note, "Ent."—entered, that is mine.

Q. The word "Ent." is yours?

A. Yes.

Mr. Podell: Now, will you be good enough to stipulate that that is the signature of Seeman Brothers (handing paper to Mr. Frank)?

[fol. 40] Mr. Frank: Yes.

Mr. Podell: It is stipulated that the paper just exhibited to the witness contains an endorsement in the original signature of Seeman Brothers, signed by Mr. Arnut, of that firm.

Mr. Frank: Yes.

Q. When did you first see that paper? You may use it, if you wish, to refresh your recollection as to the date (handing paper to witness)?

A. Possibly February 19, 1920.

Q. Possibly February 19, 1920?

A. Yes, sir.

Q. And what did you do when you received that paper? Did you then make certain entries in your records?

A. Yes.

Q. Did you make those entries on the same page that you had made the entries on November 22nd with respect to that salmon?

A. Yes, sir, I made a notation——

Q. (Interposing.) One moment.

Mr. Frank: I just want the same objection and exception to all this line of testimony.

The Court: Yes.

Mr. Podell: I offer in evidence the order of Coccoaro, bearing the endorsement of Seeman Brothers.

Mr. Frank: I object to it as incompetent, irrelevant, immaterial and not binding on the defendants.

The Court: It may go in.

Mr. Frank: Your Honor will grant me an exception?

The Court: Yes.

[fol. 41] (Paper marked Plaintiff's Exhibit No. 3.)

Mr. Frank: May I see it, please?

Mr. Podell: Yes (handing paper to Mr. Frank).

Q. Now, you say that on the receipt of that paper you made certain other entries on that same page, page 29; is that right?

A. Yes, sir, I did.

Q. Did you make them at that time in your own handwriting?

A. As soon as I received that order.

Q. And was that in the ordinary course of your duties?

A. Yes, it was.

Q. And were those entries true and correct entries?

A. Yes.

The Court: We will suspend here until two o'clock.

Recess.

Afternoon Session

ARTHUR R. SAMUT resumed the stand:

Direct examination continued.

By Mr. Podell:

Mr. Podell: If your Honor will pardon us a few moments we may save a good deal of time by stipulating certain papers.

The Court: Yes.

Mr. Podell: I have not read this copy of the ledger sheet that the witness said he made at the time.

By Mr. Podell:

Q. Is this correct—the portion that I am about to read, is that the portion which you entered up on that page at [fol. 42] the time when you received the salmon (indicating)? Do you understand my question?

A. Yes.

Mr. Podell: I am going to read it now, and you can follow me: “November 22,” and under the head of “Marks” is “1447 Blue Boy.” Under the head of “Number” is “Pink Tall.” Under the head of “Quantity” is “999 C’s.” Under the head of “Description” is “Canned salmon.” Under the head of “Condition” is “1 case 16 cans short” and “1 case 22 cans short.”

Q. Is that all that you wrote on November 22nd? Did you write all that I have just read?

A. Yes.

Q. On or about November 22nd?

A. Yes.

Q. Now, is that all that you wrote, or did you write more?

A. Not that day, but the next day.

Q. The next day?

A. Yes, November 23rd.

Q. Is that all that you wrote on November 23rd?

A. Yes.

Q. Because there appear to be certain entries on the other side of the sheet, and I want you, if you are not sure, to look at them and tell us when you wrote the other entries (handing paper to witness)?

A. I have written this date "11/22/19" No. 873, referring to the warehouse receipt, and the date it was issued.

Q. You also wrote those two items on November 23rd?

A. Yes.

Q. The two items being, under the head of "Date," November 22, 1919, and under the head of "Negotiable Receipt No." the word "None," which means non-negotiable receipt No. 873. Now, have I read everything that you wrote on November 23rd with respect to these 999 cases of salmon?

A. Yes.

[fol. 43] Q. There appear to be other entries to the right of those which I have just read, on the same page. Tell us when you wrote those (handing paper to witness)? Never mind reading the entries; just tell us when you wrote them?

A. I wrote them when I made the transfer.

Q. When was the date?

A. November—no, February 18, 1920.

Q. And those items on the same page read, "Delivered," under the head of "Delivered" February 18, 1920; quantity 999; order, 542-C, and then "3/3." What does that mean?

A. The rate—the storage rate.

Q. The rate of storage?

A. And labor, three cents to a case.

Q. "8684" under the head of "January." What is that?

A. That is a bill number, a storage bill number.

Q. For storage?

A. Yes.

Q. "8510." What is that?

A. That is another storage bill, one January and one December.

Q. Under the head "January" No. 8684, and under the head of December, No. 8684, and under the head of December, No. 8510; in handwriting "1-10-20, six tins sample." What does that mean?

A. It means Coccoaro has sent off samples of that lot.

Q. That Coccoaro has sent off samples on that lot?

A. Yes.

Q. "2-19-20, three tins, sample." Same date, twelve tins sample. Does that mean that on those dates he called for similar samples?

A. That those samples have been drawn.

Q. "Transferred to Seeman Brothers." I believe that you have already stated that you made this last entry at the time when you received this order bearing the endorse-
[fol. 44] ment of Seeman Brothers?

A. Yes, sir.

Q. An order from Coccaro, and then endorsed by Seeman Brothers?

A. Yes, sir.

Q. I show you a form bearing printing "Received from Yorke Storage & Warehouse Company, Inc.," and ask you whether you recognize that as a form of receipt used by the storage warehouse (handing paper to witness)?

A. Yes, sir.

Q. At the time when you were in their service?

A. Yes, sir. No; this is not a receipt; this is a delivery order.

Q. Is that a delivery order?

A. Yes, sir, that is the form of a delivery order.

Q. And just what is meant by the words "Delivery Order?"

A. It means that it is a form of warehouse handed to the checker in order to deliver goods, what it calls for there.

Q. Goods as called for on the delivery order?

A. On that delivery order.

Q. Whose handwriting is on the one that I show you?

A. It is always filled out by me.

Q. And does this paper contain your handwriting?

A. Yes, sir; not all of it, though.

Q. Now, I show it to you, and you can tell us what part of it is yours. I show you nine of these pink slips, we call them, and ask you whether they contain your handwriting in all but the signature (handing papers to witness)?

A. On these delivery orders—the carbon writing it is mine. The date is dated by the checker after delivery takes place, and is checked out by the three initials "J. O'D." which are made by O'Donnell, the checker, after goods are delivered out.

Q. You do not know anything about the signatures?

[fol. 45] A. Yes, every one of them would be signed before I gave it to the truckman, the driver—the driver signs in front of me.

Mr. Podell: It is stipulated that the three pink slips being offered in evidence now bear the signature of Armut, who was in the employ and acting in behalf of the defendants, Seeman Brothers?

Mr. Frank: Yes.

Mr. Podell: I offer them in evidence. You had better mark them separately.

(Papers marked respectively Plaintiff's Exhibits Nos. 4, 5 and 6.)

Q. Now, look at these numbers, 2657 and 2726. Were they on there at the time that you received those orders (handing papers to witness)—do you know?

A. Yes.

Q. Were they on at the time you received the orders? Who put those numbers on there, do you know?

A. 2726?

Q. Yes.

A. I put those numbers on.

Q. Those are in your handwriting?

A. Yes, those are my delivery order numbers

Q. You wrote them on at the time in the regular course of business?

A. As soon as the driver presented those orders to me.

Q. You wrote those numbers on?

A. Yes.

Mr. Podell: It is stipulated that the twenty-five cases represented by the two slips about to be offered in evidence now, were ordered by the——

Mr. Frank (interposing): It is stipulated that those papers were signed by the truck driver of the Export Fish Company.

[fol. 46] **Mr. Podell:** In behalf of Seeman Brothers?

Mr. Frank: Yes.

Mr. Podell: It is stipulated that the papers now about to be offered were signed by the truck driver of the Export Fish Company in behalf of Seeman Brothers, the defendants. I offer them.

(Papers marked respectively Plaintiff's Exhibits No. 7 and 8.)

By Mr. Podell:

Q. I omitted to ask you, these pink slips that have just been marked Exhibits Nos. 4, 5 and 6, they are headed "Warehouse Order." Are they your documents? Were they documents of the warehouse, or did the warehouse use any such forms?

A. I don't believe so. Let me see.

Q. Look at them (handing papers to witness)?

A. No, these are Seeman's orders.

Q. Seeman Brothers' orders?

A. Yes.

Mr. Podell: They bear on the left hand side, in front, "Seeman Brothers, Hudson and North Moore Streets, New York." These two orders of the Export Fish Company, admitted to have been taken in behalf of Seeman Brothers, read as follows (reading to the jury Plaintiff's Exhibits Nos. 7 and 8). That makes a total of 949 cases, and those 25 cases make 974. Mr. Frank, it is likewise stipulated that the document now about to be offered is a receipt for 21 cases of Blue Boy pink salmon?

Mr. Frank: No, we will not stipulate that. We will stipulate it was signed by a truck driver in behalf of Seeman Brothers.

[fol. 47] Mr. Podell: That the receipt about to be offered in evidence was likewise signed by a truck driver in behalf of Seeman Brothers?

Mr. Frank: Yes.

Mr. Podell: I offer the paper in evidence.

(Paper marked Plaintiff's Exhibit No. 9.)

Mr. Podell: This is a receipt, gentlemen, for 21 additional cases. The 974 previously shown, plus 21 additional, makes 995. Now, I offer in evidence a receipt from the same concern, Romain Trucking Company, which was likewise signed in behalf of Seeman Brothers, for four cases.

Mr. Frank: By a truck driver?

Mr. Podell: Yes, by a truck driver in behalf of Seeman Brothers, for four cases, making up 999 cases.

Mr. Frank: Of course, I am simply stipulating that these truck drivers signed these various papers.

Mr. Podell: In behalf of Seeman Brothers?

Mr. Frank: Yes, in behalf of Seeman Brothers, but not

the authority of the truck drivers as to any of these statements contained in these papers.

The Court: No.

(Paper marked Plaintiff's Exhibit No. 10.)

Mr. Podell: I do not know whether your stipulation, Mr. Frank, was quite full enough, with regard to the authority of the trucking man. You do not deny that he was acting in behalf of Seeman Brothers at the time he signed?

[fol. 48] Mr. Frank: No. I say he had the authority that any truckman has to sign any paper.

Mr. Podell: He was in the employ of Seeman Brothers?

Mr. Frank: Sent there to take certain goods away, and give a receipt for whatever he took.

By Mr. Podell:

Q. After you received these orders that I have read, to deliver to these people whose names appear thereon, did you, on delivery, have them sign these receipts (handing papers to witness)?

A. Yes, the driver signs the receipts before he gets this paper. It is bound in a book in triplicate.

Mr. Frank: I did not get that.

Mr. Podell: I will consent to have it stricken out. It was not entirely responsive.

Mr. Frank: Would you mind talking louder? I can not hear you at all.

Q. Did you receive those receipts at the time when you made those deliveries? Just answer yes or no.

A. Yes, sir.

Mr. Podell: It is stipulated that the signatures appearing at the foot of the receipts about to be offered in evidence, were made in behalf of Seeman Brothers by truckmen in their employ, and acting in their behalf?

Mr. Frank: Truckmen authorized to sign for goods they took.

Mr. Podell: Yes. I offer those in evidence.

Mr. Frank: May I see them, please?

Mr. Podell: Certainly (handing papers to Mr. Frank).

[fol. 49] (Papers marked respectively Plaintiff's Exhibits Nos. 11 to 18, inclusive.)

Q. Is that order 903 or 1903 (handing paper to witness)?

A. 1903.

Q. Now, you testified that you saw the salmon when it first came in, for which you issued receipt No. 873?

A. The next day I seen them piled up in the warehouse.

Q. Saw the cases?

A. Yes, sir.

Q. Did you likewise see the cases that went out, for which these receipts were given?

A. No.

Q. Did you see any of them?

A. No.

Q. Did you make an entry in your book with respect to the receipts?

A. To the deliveries, yes.

Q. With respect to the deliveries?

A. Yes.

Q. And where is that entry? Had you, previously to making any deliveries, issued any receipt to Seeman Brothers? Do your records show any receipt was issued to Seeman Brothers (handing paper to witness)?

A. Yes, it shows that a non-negotiable receipt has been issued.

Q. What is the date?

A. The date is February 20.

Mr. Frank: If the witness is testifying of his own knowledge, that is one thing. The record which he is testifying to is not offered in evidence.

The Court: Yes.

Q. Did you personally write out the body of the receipt—the warehouse receipt issued to Seeman Brothers?

A. Can I look at the receipt?

Q. Surely, you may look at it.

Mr. Podell: Will you produce the original, please?

[fol. 50] Mr. Frank: I haven't got it.

Mr. Podell: You will not object to our using a copy?

Mr. Frank: No.

Q. Look at the carbon copy and tell us in whose handwriting is the body of that receipt (handing paper to witness)?

A. It is all mine, outside of the signature.

Q. And who signed it?

A. James Polito.

Q. Do you know him?

A. Yes.

Q. Do you know his handwriting?

A. Yes.

Q. You can testify that that is his signature?

A. Yes.

Q. Who was he?

A. He was in charge of the trucking department.

Q. Who was he?

A. A gentleman in charge of the trucking department.

Q. In whose employ?

A. A. J. Coccaro & Company.

Q. That is, the Yorke Warehouse Company?

A. Yes.

Q. And was it part of his duties from time to time to sign warehouse receipts?

A. That I could not tell.

Q. But in any event that is a copy of a warehouse receipt that was signed by Polito?

A. Yes.

Q. And what was the date that that receipt was issued?

A. February 20, 1920.

Q. What number was that receipt given?

A. 952.

Q. Now, on this order of Coccaro's, signed and endorsed by Seeman Brothers, there appear under the words in print "Ex receipt," the number 873. What is that number? [fol. 51] What does that number represent, under the words "Ex receipt" printed down below?

A. That is receipt No. 873.

Q. Yes. What was "873"?

A. 873 is the number of the non-negotiable receipt issued by me and signed by me.

Q. To whom?

A. To Philadelphia Warehouse Company.

Q. Our receipt—the one you had given to us, to the Philadelphia Warehouse Company?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And the one you had given them was what date?

A. What is that?

Q. What date had you given that receipt to the Philadelphia Warehouse?

A. The records will show.

Mr. Podell: Well, here it is (handing paper to witness).

Mr. Frank: It is in evidence.

Q. Is this the one that you referred to (indicating)?

A. Yes.

Q. Referring to Exhibit No. 2 in evidence? Just look at the date that you had issued that receipt?

A. November 22, 1919.

Q. Now, what did the words "Ex 873" mean?

A. It means that the same lot covered by that receipt 873—

Q. (Interposing.) Was to go to whom?

A. Was to go to Seeman Brothers.

Q. And did it go to Seeman Brothers?

A. According to the deliveries, it did.

Mr. Frank: I move that that be stricken out.

The Court: Yes, strike it out.

[fol. 52] Q. Out of those receipts that have been offered in evidence and delivery orders, do you know from what lot those goods were taken?

Mr. Frank: I object.

Q. Well, do your records show from what lot those goods were taken? Just answer that yes or no.

The Court: Yes.

A. Yes, they show it.

Mr. Frank: I object.

The Court: Objection overruled.

Mr. Frank: Exception.

Q. And are those records in your handwriting?

A. Yes, sir, they are all.

Q. And were they made at the time when you received the order?

A. They were made a day after the goods were delivered.

Q. Well, I am talking about the date when you received that order which bears the endorsement of Seeman Brothers. You said you wrote the words "Transferred to Seeman Brothers." Do you remember that?

A. Yes, I do remember that.

Q. And was that entry made at the time when you received the order?

A. The next day.

Q. The next day?

A. Yes, always the next day.

Q. And is your entry on that book—does your record show that the entry was made with respect to the identical goods listed under No. 873 warehouse receipt, that had been issued to the Philadelphia Warehouse Company?

Mr. Frank: I object to that as incompetent, irrelevant, immaterial, and calling for records not in evidence.

[fol. 53] Mr. Podell: The document is in evidence.

The Court: He may answer.

M. Frank: Exception.

Q. What is your answer?

A. Repeat that question, please.

Mr. Podell: Yes, please read it.

(Question read.)

The Witness: Yes.

Mr. Podell: Now, I ask for the production of the account of Seeman Brothers with respect to the receipt of salmon as indicated by these receipts.

Mr. Frank: We will stipulate that we received a number of cases on the corresponding dates to those mentioned in the receipts, and corresponding in amounts.

Mr. Podell: It is stipulated that on or about when—let us formulate this stipulation.

Q. You understood, Mr. Samut, that when I asked you about the entry that you made, I referred to the words "Transferred to Seeman Brothers," and I asked you whether those words were written by you opposite the account of the 999 cases of salmon which had been covered by the warehouse receipt No. 873 previously issued to the

Philadelphia Warehouse Company. Did you understand that question?

A. Yes, I do.

Q. And your answer is what?

A. Is "yes."

Mr. Frank: That is subject to the same objection I had before?

The Court: Yes.

Mr. Frank: We will stipulate that Seeman Brothers, or [fol. 54] persons with whom they did business, received cases of Blue Boy Salmon equal in amount to the various quantities indicated on the exhibits——

Mr. Podell (interposing): I want more than that.

Mr. Frank: What do you want?

Mr. Podell: I will dictate it; that Seeman Brothers in and about the month of March, 1920——

Mr. Frank (interposing): March?

Mr. Podell: February and March of 1920, received 999 cases either for themselves or in behalf of persons to whom they made sales of that salmon, and that said 999 cases came out of the Yorke Storage & Warehouse Company, Inc., pursuant to an order which is Exhibit No. 3——

Mr. Frank (interposing): No, I will not stipulate that.

Mr. Podell: Then, I must ask you to produce your books, please.

Mr. Frank: I haven't got them at this moment.

Mr. Podell: You promised to have them.

Mr. Frank: Our stipulation is that we received those cases of salmon. The only objection I am making is as to how or why they were delivered to us.

Mr. Podell: I am simply saying pursuant to this order.

Mr. Frank: I do not know anything about that. The fact that they were received I am willing to stipulate. We got 999 cases of salmon; we got them on or about the dates that those orders are dated.

[fol. 55] Mr. Podell: From the Yorke Storage & Warehouse Co.?

Mr. Frank: Yes, from the Yorke Storage & Warehouse Co.

Mr. Podell: Also that some of them you had sold to other people?

Mr. Frank: Yes, that is quite correct. The only thing I

do not want is a conclusion as to how or why they were delivered to us.

Mr. Podell: I do not ask for conclusions. I still ask you to produce your books.

Mr. Frank: Which particular books?

Mr. Podell: All books containing entries with respect to these 999 cases of salmon.

Mr. Frank: We will give you everything we have on it.

Mr. Podell: These 999 cases which you received as Blue Boy Pink Salmon—described as Blue Boy No. 1 Tall, and containing 48 tins to a case?

Mr. Frank: Yes.

Mr. Podell: It is stipulated that on February 25 the defendants sold to Kalish & Fortnan a certain portion of these 999 cases; that on March 5 to the Export Fish Co. a certain portion thereof was sold, and on March 12 to the Export Fish Co. a certain portion thereof.

Now, I call for the production of the records showing the price paid for the merchandise at the time of such re-sale.

Mr. Frank: I will state this: that we haven't those records available, because the defendants were incorporated subsequently to the commencement of this suit; but I can [fol. 56] obtain that information from the people to whom we re-sold. These were cash sales, and we have no records to show them.

Mr. Podell: You haven't any records at all?

Mr. Frank: No.

Mr. Podell: Well, we will see about that later.

Mr. Frank: I submit, at the same time, that it is entirely immaterial at what price we re-sold them. The question is what was the reasonable market value at the time.

Mr. Podell: I do not dispute that, but I do not admit that the price of re-sale is not some evidence as to the value.

The Court: Well, you can argue that out later.

Mr. Podell: Yes.

The Court: It will not prejudice you any.

Mr. Podell: No. You may examine.

Cross-examination.

By Mr. Frank:

Q. You answered Mr. Podell's question by saying you were in his office only after you had met him in court. Were

you to the office of the attorney of record, Mr. Goetz, previous to the time you had been in court?

A. Yes, I was.

Q. And how frequently were you there? How many times did you go there?

A. I am not sure whether it is two or three times.

Q. And then you went once to Mr. Podell's office, making three or four times that you were to the attorneys' offices, is that correct?

A. Yes, sir.

Q. And when you went to the attorneys' offices, did you find all these records that have been produced in court in that office?

A. Yes, sir, I did.

[fol. 57] Q. All these Yorke Warehouse & Storage Company papers?

A. What I see there, yes.

Q. And when had you seen them last?

A. Wednesday last.

Q. No, I mean before you went to the lawyers' office, when had you seen them for the last time?

A. At Mr. Paul Cooksey's office, 29 Broadway.

Q. When had you seen them there?

A. I could not remember; some time a week before that.

Q. Who accompanied you to that office at 29 Broadway?

A. Mr. Watson.

Q. Mr. Watson is connected with the office of the attorneys for the plaintiff in this case, is he?

A. Yes.

Q. And how frequently had you been down there with Mr. Watson?

A. Twice.

Q. And when did you see Mr. Watson for the first time?

A. I don't recollect exactly, but it is about a month or so—a month and a half or so ago.

Q. How many times did you go with Mr. Watson to any place at all besides the office of the attorneys?

A. Well, only twice at Mr. Cooksey's office.

Mr. Podell: Mr. Cooksey's office?

The Witness: Mr. Paul Cooksey's office.

Mr. Podell: He is not the attorney.

Mr. Frank: No, he is not.

Q. Mr. Cooksey is an attorney who was formerly the President of the Yorke Storage & Warehouse Company?

A. The receiver.

Q. Is that right?

Mr. Podell: A trustee or receiver in bankruptcy.

Mr. Frank: No, he was not the president.

[fol. 58] Q. Who were the officers of the Yorke Storage & Warehouse Company?

A. At the time I was employed there, there was Mr. Gibbs was supposed to be the president.

Q. Let us see. The time you were employed would be in May, 1919?

A. Yes, sir.

Q. When did you leave the employ of the Yorke Storage & Warehouse Company?

A. September 18, 1920.

Q. That is, you were there after the bankruptcy of Coccaro?

A. Yes, sir.

Q. And you were there during the time that Mr. Cooksey—

A. I say "yes." I don't know whether Coccaro was bankrupt or not. I never knew the date he was, or that he was at all.

Q. You have a pretty good memory, have you not?

A. I have, but I didn't know what the case was—

Q. (Interposing.) You did not know in May, 1920, that Coccaro went into bankruptcy?

A. In May, 1920?

Q. You don't mean to tell these gentlemen—

Mr. Podell (interposing): He has asked you a question, Mr. Frank.

Q. You mean to tell these gentlemen that you did not know Mr. Coccaro went into bankruptcy?

A. No, I did not know.

Q. You did not know?

A. No, I did not know.

Q. You say Coccaro was your boss and the owner of the warehouse?

A. Yes.

Q. Is not that what you told us on direct examination?

A. Yes, but he was not in the warehouse at all. Coccoaro had an office separate from the warehouse, and I very seldom saw him; maybe twice in the whole employ.

[fol. 59] Q. But he was your boss?

A. Yes.

Q. And you did not know he went into bankruptcy in May, 1920?

A. No, I did not know at that time.

Q. You did not know at all when that event occurred, that Coccoaro went into bankruptcy?

A. No, I did not know.

Q. Do you know a man named Mr. Marsh?

A. Yes.

Q. And you knew Mr. Marsh was president of the Yorke Storage & Warehouse Company, did you not?

A. Yes, sir.

Q. And was not Mr. Marsh there every day?

A. Yes, sir.

Q. Did you know a man by the name of James Polito?

A. Yes.

Q. And you knew he was the treasurer of the Yorke Storage & Warehouse Company?

A. I don't believe I knew then, at that time. I might have known later.

Q. I am talking about the months of January and February, 1920.

A. No, I did not know that James Polito was the treasurer of the company.

Q. You knew he was some officer of the company, did you not?

A. I knew he was one in charge of the trucking.

Q. Don't you know that he signed warehouse receipts generally?

A. Yes, I knew on that case only; not all the time.

Q. You saw him sign a great many warehouse receipts, did you not?

A. No, not outside of that, I never seen him sign anything.

Q. You know about many warehouse receipts made out in the name of the Philadelphia Warehouse Company, did you not?

[fol. 60] A. Yes, I filled out the body of them, but I don't know whether Polito signed them or someone else.

Q. Did you ever sign any warehouse receipt in your life but this one that has been marked in evidence?

A. I did, but only non-negotiable receipts.

Q. So when it was non-negotiable receipt you signed it?

A. Yes.

Q. And when it was a negotiable receipt you took it to someone else to sign?

A. Yes.

Q. And who was that someone else?

A. Either Mr. Marsh—think I might have given some to Polito to sign.

Q. You remember that Polito signed others?

A. I think so, but I am not sure.

Q. You know in most cases you got both signatures, Marsh's and Polito's?

A. Yes, I think I did. Marsh I am sure of.

Q. Were not Marsh and Polito around there all day?

A. Yes, sir.

Q. And as I understand it you had full charge of checking the merchandise at the door, and going upstairs and looking at the stuff, and making entries in the books, didn't you?

A. Yes, sir.

Q. Was this warehouse marked off in floors? Were there various floors in it?

A. Yes, sir.

Q. Various sections of the floor?

A. No, not sections; floors.

Q. Were there no sections?

A. No, I don't believe so.

Q. Will you look at the receipt or paper that has been marked—these pink slips, for example, Exhibit 18; do you see two lines there where it says "Floor and "Section" (handing paper to witness)?

A. Yes, sir.

[fol. 61] Q. Well, were not those put there because there were floors and sections?

A. No, there were not any sections. We were not particular to put the sections on as long as the floor was on.

Q. Can you tell us of your own recollection on what floor

of the warehouse this salmon was, that you say you saw come in there?

A. Yes, sir.

Q. What floor was it?

A. On the third floor.

Q. But there was no section?

A. No section.

Q. When these receipts—for instance, Exhibit 18—came in, you did not write what floor they were on, did you?

A. No.

Q. And you did not put it on any of these receipts, did you?

A. I might have put on some of them; the reason is because—

Q. (Interposing.) Please. You did not write it on any one?

A. No; I might have written it on some.

Q. Well, just satisfy yourself about that, that you did not put down "Third floor" on any of them (handing paper to witness).

A. No, I haven't put it down.

Q. Let me see this again, for a moment.

A. (Handing paper to Mr. Frank.)

Q. Have you any record anywhere showing what floor these salmon were on?

A. Yes, sir; the ledger.

Q. Have you that ledger here?

A. Yes, sir, I just had it.

Q. Did you make the entry in the ledger?

A. Yes.

Q. When did you make that?

A. The next day after the goods were received; that would be November 23.

Q. Will you look at Exhibit No. 1; you will see two lines, [fol. 62] and the word "Out." Who wrote that?

A. I did. That means that line is out.

Mr. Podell: That means that line is out?

The Witness: Yes.

Q. When was it that you wrote that?

A. On November 23, 1919. Excuse me; I meant to say on February 19, 1920.

Q. And that is the date that you made this mark and wrote the word "Out"?

A. Yes, sir.

Mr. Podell: The first date you gave is incorrect. The second date is correct?

The Witness: Yes, sir.

Mr. Podell: February 19th?

The Witness: February 19th, 1920.

Q. You stated in answer to Mr. Podell's question, that certain marks on this paper indicate the date you sent the bill for the storage?

A. Yes, sir.

Q. Did you send these bill for storage likewise?

A. Yes, sir.

Q. To whom did you send them?

A. Philadelphia Warehouse Company.

Q. Do you know who paid them?

A. No.

Q. Do you know whether they were paid?

A. No.

Q. Did you keep those records?

A. No, sir.

Q. Who kept those?

A. John Dougherty, the bookkeeper.

Q. Did you open an account for the Philadelphia Warehouse Company?

A. I don't believe I did. Let us see.

Q. Well, is it in the papers which are marked together as Exhibit No. 1 (handing papers to witness)?

A. This would be all A. J. Cocarro's account.

[fol. 63] Q. Do you find any account of the Philadelphia Warehouse Company there?

Mr. Podell: What is your question?

Mr. Frank: He can say yes or no.

Mr. Podell: I have the account here.

Mr. Frank: That is a copy.

Mr. Podell: It is not a copy; it is the original (handing paper to Mr. Frank).

The Witness: No.

Q. Did you have a record showing the issuance of receipt No. 873?

A. Yes, I have a record in here.

Q. Well, is that the only record that you have?

A. Yes, because that is the only account until then that I had.

Q. You had a copy of that exhibit in your books, did you not?

A. Yes, I had, of this.

Q. Now, I call your attention to Exhibit No. 3, which is a delivery order from A. J. Cocarro to Seeman Brothers?

A. Yes, sir.

Q. When you received this paper on February 18, did you look at your records (handing paper to witness)?

A. Yes, I looked at my records.

Q. And did you see at that time that there was outstanding a warehouse receipt to the Philadelphia Warehouse Co.?

A. Yes.

Q. And did you make any entry or notation in your book at that time?

A. Yes, I made a notation to transfer to Seeman Brothers.

Q. Although you knew that there was this other warehouse receipt outstanding?

A. Yes, sir.

Q. And did you in your own handwriting then prepare the warehouse receipt No. 952 to Seeman Brothers (handing paper to witness)?

A. Yes.

[fol. 64] Q. Well, you knew at that time that there was another warehouse receipt outstanding for the same goods, did you not?

A. Yes, I knew.

Q. And, nevertheless, you drew this warehouse receipt?

A. Yes, because I did not know the disposition of the first one.

Q. Well, did you inquire from anybody the disposition of the first one?

A. Yes, I did.

Q. Whom did you make the inquiry of?

A. From A. J. Cocarro & Company.

Q. Who is A. J. Cocarro & Company?

A. My boss.

Q. I know, but which one of the people there did you speak to?

A. A. J.

Q. Did you speak to him personally, or did you call him up on the telephone?

A. On the telephone.

Q. On the telephone?

A. Yes.

Q. And at that time did you have the other warehouse receipt returned?

A. No, sir.

Q. You did not have it in your possession?

A. No, sir.

Q. It was not in the warehouse?

A. No.

Q. And you made out the second warehouse receipt for the same lot of goods?

A. Yes.

Q. And whom did you give it to?

A. I gave it to James Polito to sign.

Q. Did you know anybody connected with the Philadelphia Warehouse Company at that time?

A. I hardly believe so.

Q. Had you been sending them bills regularly?

A. Yes, by mail.

Q. That was in February, 1920?

A. Yes.

Q. Did you send them bills for this lot of goods after February, 1920?

A. Yes—after?

[fol. 65] Q. Yes.

A. I sent them a bill for November, December, and a bill for January.

Q. Then you stopped when you came to February, and you did not send them any more bills, because you transferred it to Seeman Brothers?

A. Correct.

Q. Did anybody from the Philadelphia Warehouse Company ever come to see you and ask why they did not get any more bills?

A. No, I don't remember that they did.

Q. And you are quite sure that you never sent any other bills for that storage to anybody?

A. Yes, I am sure of that.

Q. How long were they in there after you made that transfer?

A. In where?

Mr. Frank: Withdrawn.

Q. I call your attention to the non-negotiable warehouse receipt which you drew, No. 952, dated February 20?

A. Yes.

Q. Now, from February 20 on truckmen started to come there from Seeman Brothers to take quantities of goods away, did they not?

A. Yes, sir.

Q. And you were there and you let them take it out?

A. Yes.

Q. So that all of the merchandise was there for some time—some of it for a week, some for two weeks, some of it for a month, was it not?

A. I only looked at the lot only once, a few days after it was in the warehouse. After that, I never looked at it any more.

Q. Did you not testify and tell these gentlemen how you checked up all these various shipments that went out?

A. Oh, no, I never said anything like that. We had a checker to do that. I always stayed at my desk in the office.

[fol. 66] Q. So all you know about it is what this checker told you?

A. Yes, his record.

Q. Is there any record you have anywhere that shows where you ever sent Seeman Brothers a bill for storage of the goods during the time they were there?

A. Yes, it would show on the account of Seeman Brothers.

Mr. Frank: Have you got that account?

Q. Will you tell us if you sent Seeman Brothers a bill, and if so, when (handing paper to witness)?

A. Yes, I have sent only one.

Q. When was that?

A. February.

Q. What?

A. The February bill.

Q. Do you know how much it was?

A. I have no recollection.

Q. Do you know whether it was paid?

A. I could not tell that either, no.

Q. That is not in any of the records you saw down to Mr. Cooksey's office or in the attorneys' office?

A. No, sir.

Q. I gather from what you say that you sent all bills out monthly, is that right?

A. Every month, yes.

Q. And the last bill you sent to the Philadelphia Warehouse for this lot of salmon was when?

A. In the month of January.

Q. You sent them no bill for February at all?

A. No.

Q. Although the date on which you drew the non-negotiable receipt to Seeman Brothers, No. 952, was on February 20?

A. Yes.

Q. Did you split the storage charges for that month?

A. I charged Seeman Brothers storage from—as the receipt says, free storage expires.

[fol. 67] Q. Up to February 20th—from February 1 to February 20 did you send a bill for those 20 days to the Philadelphia Warehouse, or to Cocarro?

A. I would have to look at the bill to see how far I have charged. This would be up to January—to February 22. The last bill that I have sent to the Philadelphia Warehouse Company would be from January 22, to February 22.

Q. When was the first time that you ever heard from the Philadelphia Warehouse or anybody connected with them about this lot of salmon, after you sent them the last bill?

A. From A. J. Cocarro & Company—

Q. (Interposing.) No, I asked you when was the first time you heard from the Philadelphia Warehouse?

A. I am telling you, from A. J. Cocarro.

Q. Did you ever hear from the Philadelphia Warehouse Company about it at all?

A. Do you mean by letter—no.

Q. Letter or any other way.

A. No, I didn't know who the people were.

Q. You were sending them bills, were you not?

A. Well, I don't have to know them.

Q. Please do not argue with me. You sent them bills, did you?

A. Yes, sir.

Q. Had anybody ever been there, to your knowledge, to look at any part of the goods, or to speak to you about where they were, up to February 20, 1920?

A. I believe, yes, Mr. Cosgrove was there.

Q. So you did know Mr. Cosgrove?

A. Well, I had an idea he belonged to the Philadelphia Warehouse Company, but there were so many people at that time.

Q. The Philadelphia Warehouse Company had a lot of [fol. 68] transactions in connection with the Yorke Warehouse, did they not?

A. I don't know about that.

Q. Did you not write that down frequently, "Philadelphia Warehouse Company"?

A. Not frequently. I hardly believe I wrote it once.

Q. You do not mean to tell these gentlemen that you did not know Mr. Cosgrove was connected with the Philadelphia Warehouse Company, and that he came to your warehouse to see about things there, do you?

Mr. Podell: You ask about two or three questions in one.
Mr. Frank: Withdrawn.

Q. I ask you whether you did not know Mr. Cosgrove as a representative of the Philadelphia Warehouse Company?

Mr. Podell: I object to that as wholly immaterial to the issues in this case, and as having no bearing on it at all.

The Court: He may answer.

Mr. Frank: Would you mind reading the question, Mr. Stenographer?

(Question read.)

The Witness: I did not.

Q. All right. You testified a moment ago that there was no other Blue Boy salmon in the warehouse at that time or at any time. Are you testifying to that from what you remember, or merely from books and records?

A. From books and records.

Q. You have no recollection of it at all?

A. Oh, no; if I had to go by memory, no.

[fol. 69] Q. Were you in the warehouse all the time?

A. All the time, every day.

Q. And it was not very frequently that you went up and looked at the goods, was it?

A. It was frequently, when it was received.

Q. But not when it went out?

A. No, not when it went out. There were other men to take care of that.

Q. You never opened any of these goods to see what was in it—any case?

A. We are not supposed to do that in a warehouse.

Q. But you did not?

A. No, sir, only when it is damaged, in two cases.

Q. So there were a great many cases coming in and out of there all the time—

A. (Interposing.) Yes, sir.

Q. (Continuing:)—which you did not look into at all?

A. Oh, no, if I don't happen to be at the gate.

Mr. Frank: That is what I mean. That is all.

Redirect examination.

By Mr. Podell:

Q. You say you made and kept all the records of goods that were received yourself, is that right?

A. Yes, sir.

Q. And have you got the records there of all the goods received in and between November of 1919 and February of 1920?

A. Yes, sir.

Q. Have you got them there?

A. Yes, sir. All the accounts?

Q. Yes.

A. This is only the account of A. J. Cocarro & Company.

Q. Are these papers that I show you the accounts of all the others for that period of time, or at least do these papers [fol. 70] include the accounts of all the others for that period of time (handing papers to witness)?

A. They are not all in my handwriting. Some of these have been written after September 18, when I left.

Q. September 18 of what year?

A. Of 1920.

Q. September 18, 1920?

A. Yes.

Q. But are all the items entered here in and between November, 1919, and February, 1920—are all those in your handwriting?

A. They are all mine. The book was kept only by me.

Q. Of course, you could not state from independent recollection as to what goods were received, and at what time they were received, could you?

A. Oh, no.

Q. But by refreshing your recollection from those records, could you then say what goods were received and when they were received, by examining those records? Can you then say whether or not goods were received of a certain kind or description during that period?

A. Yes, I could.

Q. And have you used those records for the purpose of refreshing your recollection as to the goods received in and between November, 1919, and February, 1920? Have you examined those records that you say you made yourself?

A. Yes.

Q. And from those do you testify that there was no other salmon except these 999 cases?

A. There was no other salmon at the warehouse.

Mr. Podell: Now, those records are all embodied here, Mr. Frank, and if you want them in evidence, I have no objection to their going in. In fact, I offer them all in evidence.

[fol. 71] Mr. Frank: I would like to ask a question or two before you offer them.

By Mr. Frank:

Q. Counsel has showed you here a lot of loose leaf pages, from, I presume, a loose leaf ledger?

A. Yes, sir.

Mr. Powell: These papers have been subpoenaed and have just been produced.

Mr. Frank: I am asking a question.

Mr. Podell: In connection with my offer—

The Court (interposing): He is examining with a view of objecting to your offer, or determining whether to object. That was his announced purpose.

Mr. Podell: Your Honor, I have been examining this wit-

ness on redirect, and he requested, as a matter of courtesy, the privilege of asking him a question, and I think it is only fair to state in connection with my offer that these papers—I will state that they are produced under subpoena served on the trustee in bankruptcy and that they were brought to court this morning by the trustee.

Mr. Frank: I think you are a little bit inaccurate in that.

Mr. Podell: By Paul Cooksey, from his possession.

Mr. Frank: Formerly President of the Yorke Warehouse Company.

Mr. Podell: They have never been in the office of the attorney for the plaintiff. He so testified, but it is his mistake.

[fol. 72] Mr. Frank: Would you mind reading the last question I asked?

The Court: If it is of any importance as to whether or not they have been in the office of any of the attorneys, of course, testimony is the only way that the jury can decide that. Whether the witness is mistake- or not in what he has testified to is going to depend upon testimony offered. I cannot permit counsel to say that his witness is mistaken.

Mr. Podell: I only say that because counsel made the statement that they were in my office.

The Court: I know, but testimony is in the case that they were in office of the attorneys. Counsel is justified in stating what is in the case. Other counsel is not justified in contradicting the witness, except by going on the witness stand.

By Mr. Frank:

Q. Now, referring to these papers that Mr. Podell has produced here, they were originally part of a loose leaf book, were they?

A. Yes, sir.

Q. And they are produced here in the form of loose sheets?

A. Yes.

Q. And the rest of the book is not produced?

A. Yes.

Q. The last time you saw them at the warehouse, they were in the form of a complete book?

A. Yes, sir, bound.

Q. Will you tell me what there is to show you now whether these sheets are all the sheets that were in the book, or whether they are complete, or in the same condition they were when you left that place?

A. No, that I could not tell.

Mr. Frank: I know.

By Mr. Podell:

Q. Mr. Samut, I was about to ask you when counsel began questioning you, as to whether these are the papers you saw in the office of the attorney (handing papers to witness)?

A. Yes, this is a copy Mr. Marsh made.

Q. I did not ask you that. I ask you if those are the papers you saw in the office of the attorney, Mr. Goetz?

A. Yes.

Q. The attorney for the plaintiff?

A. Yes.

Q. Did you ever see any of the original books that you wrote in yourself in your own handwriting, in the office of any attorney for the plaintiff?

A. I don't believe I did.

Q. What did you use?

A. I used copies.

Q. Copies that had been made——

A. (Interposing.) Of mine.

Q. Now, are those papers that you hold in your hand the only papers you saw and examined at the office of Mr. Goetz, the attorney——

A. (Interposing.) Yes, sir.

Q. Did you ever see at Mr. Goetz's office any of the papers that are now offered in evidence as exhibits? Do you understand my question?

A. No, sir.

Q. Any of these exhibits in your own handwriting, originals, did you ever see any of them in the office of Mr. Goetz?

A. No, sir.

Q. Are any of those papers that you hold now in your hand, in your handwriting?

A. I think this is what I have seen.

[fol. 74] Q. Are they in your handwriting?

A. No, sir.

Q: Any of them?

A. None of them.

Q. Now, you have stated in answer to Mr. Frank's question, that you saw the originals of these in the office of Mr. Goetz. Did you, as matter of fact, see them in his office?

A. No, I have not seen the originals; I have seen the copies.

Mr. Podell: I renew my offer of the original documents.

Mr. Frank: I object to them as incompetent, irrelevant, immaterial, as shown by the witness' own testimony—not to be complete, and not relevant on the point counsel is attempting to prove.

Mr. Podell: The testimony of the witness does not show them to have been incomplete.

The Court: They may go in.

Mr. Frank: I except.

(Papers marked Plaintiff's Exhibit No. 19.)

Mr. Podell: The papers examined by the witness in the office of the attorney are marked what?

The Clerk: Exhibit No. 20 for Identification.

By Mr. Podell:

Q. What was your salary while working for the Yorke Storage & Warehouse Company?

Mr. Frank: I object to that, if your Honor please, as incompetent, irrelevant and immaterial.

[fol. 75] The Court: Read it.

(Question read.)

The Court: Sustained.

Mr. Podell: Exception.

Q. Did you have any duties which put you into contact with negotiations with the people who put merchandise in there? Did you have anything to do with the people who put merchandise in there, at all?

A. No, sir.

Q. Did you have any transactions of any kind, or were there any sort of transactions of any kind between you and Cosgrove or the Philadelphia Warehouse Company?

A. No, sir.

Q. How many times did you say you met Mr. Cosgrove, of the Philadelphia Warehouse Company?

A. I have met him several times, but there were so many people at that time that I was confused. To day I know Mr. Cosgrove is connected with the Philadelphia Warehouse.

Q. You have seen him a number of times since then?

A. I remember I have, but I didn't have an exact idea who he was connected with.

Q. Who he was with?

A. Yes, sir.

Q. Did you take your orders principally from A. J. Coccaro?

A. From A. J. Coccaro.

Q. And did you do what he told you to do?

A. I have always followed his instructions.

Q. And did you understand that he was the owner and the boss of the concern?

A. Yes, sir, he was the man that raised my salary— that approved the raise of my salary.

Q. And so you were merely to obey his orders?

A. Yes, that is how I knew he was my boss.

[fol. 76] Recross-examination

By Mr. Frank:

Q. You only saw A. J. Coccaro about twice, you say?

A. About twice or three times at the most.

Q. At the time you went down to 29 Broadway with Mr. Watson, did you see this bunch of papers that were just marked in evidence?

A. Yes.

Q. Who went with you besides Mr. Watson?

A. Watson alone.

Q. Did Cosgrove ever go anywhere with you?

A. No, sir.

Q. Did you see Cosgrove before this case came up for trial, and after you left the employ of the warehouse?

A. Yes.

Q. Where did you see him?

A. Last week at Mr. Podell's office.

Q. That is the only one time?

A. Yes.

Q. And did you talk about this case?

A. Outside in this hall of the court.

Q. I mean down in the lawyer's office?

A. No, sir.

Q. Did you talk about anything connected with this case at all?

A. No, never spoke with him about it.

Q. He did not ask you anything at all about these exhibits?

A. No, sir.

Q. Did you make any search in Mr. Cooksey's office for any other books or papers?

A. A search, yes.

Q. And that is all you found?

A. I made a search to find out if there was any salmon outside of the 999 cases, and I found out——

Q. (Interposing.) That is the search you made?

A. Yes.

Q. There was lots of other salmon in the warehouse besides these 999 cases of salmon?

[fol. 77] A. No, only two cases, and some months afterwards the 999 cases we had.

Q. Let me see if I understand you: Do you want to tell the jury that between January and May of 1920 that this lot of 999 cases of salmon were the only cases of salmon in the warehouse?

A. Yes, sir.

Mr. Frank: That is all.

Further redirect examination.

By Mr. Podell:

Q. You said something about two other cases. When did they come into the warehouse?

A. Some days later.

Q. Later than what?

A. I have to look at the records to be exact and tell when.

Q. You say some days later. Later than what?

A. Later than all the cases—the 999 cases were delivered, if I recollect right—that will show on A. J. Cocarro's account.

Q. Look at A. J. Cocarro's account, and give us the date when those other two cases came in. Look at pages 33 and 35?

A. Page 33?

Q. Yes, and 35.

A. This might be on the copy. The original is different.

Q. Do you find it, sir?

A. No, sir.

Q. Page 33?

A. This is the original. It would be different.

Q. Look under date of March——

A. (Interposing.) Yes, there was a case.

Q. March 19th?

A. Yes, March 19th, marked "Diana Brand Pink Salmon," 1 case.

Q. March 19th, 1920?

A. Yes, and kept separate in the warehouse.

Q. March 19th, 1920?

A. Yes, sir, and kept separate in the warehouse in a private room.

[fol. 78] Q. Look at March 29.

A. Another case on March 29, Diana.

Q. Are those the only two cases?

A. Yes, these are the only two cases, according to the records, that we had.

Q. I asked you a good many questions about this case in my office, did I not?

A. Yes, sir.

Q. And Mr. Cosgrove was there at the time?

A. Yes, sir.

Further recross-examination.

By Mr. Frank:

Q. Did you know anything about two thousand cases of Tall Pink Salmon in the month of November, 1919?

A. No, sir.

Q. Those two cases of Tall Pink Salmon that you say now you know about——

A. Interposing.) Yes.

Q. (Continuing:) Have you any idea when they came into the warehouse?

A. Yes, March 19th, the first case; March 29th, the second, according to the records.

Q. You personally did not examine them at all?

A. No.

By Mr. Podell:

Q. Was Coccaro in charge of the entire warehouse, if you know?

A. Yes, two warehouses, No. 1 and No. 2.

Q. Do you know what the other warehouse was called?

A. No. 1.

Q. Where were these 999 cases?

A. The records will show whether it is No. 1 or No. 2. Oh, no; they were in warehouse No. 2 in a private room.

Q. Warehouse No. 2?

A. In a private room.

[fol. 79] Q. And what you have testified to, you have testified to with respect to Warehouse No. 2?

A. Yes.

Q. You had nothing to do with Warehouse No. 1?

A. Yes, I had, too.

Q. But your testimony covers only Warehouse No. 2?

A. Yes, only No. 2.

By Mr. Frank:

Q. No. 1 and No. 2 were two different buildings?

A. Yes.

Q. On different sides of the street?

A. Yes.

Q. But were they run as one warehouse?

A. Yes.

Q. With one set of books kept?

A. Yes.

By Mr. Podell:

Q. That is, for the Yorke Storage & Warehouse Company?

A. Yes.

Q. And there was Warehouse No. 1 and Warehouse No. 2?

A. Yes.

Q. Did you also hear about the Republic Storage & Warehouse Company?

A. No, sir.

Q. You never heard of that?

A. I knew there was such a company, but never heard of it—had anything to do with it.

Q. It was a separate concern?

A. Yes.

Q. What you have testified to includes warehouses No. 1 and No. 2?

A. Yes, sir, and there were none outside of these 999 cases in either warehouse.

Q. In either No. 1 or No. 2?

A. Yes, sir.

Mr. Podell: That is all.

Mr. Frank: That is all.

(Witness excused.)

[fol. 80] EDWARD BORN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Born, what is your business?

A. Salt and canned fish business.

Q. And were you in that business in the year 1920?

A. Yes, sir.

Q. In the course of that business, did you handle any pink salmon?

A. Yes.

Q. Did you handle it in the way of buying and selling it?

A. Yes, sir.

Q. In the open market?

A. Yes.

Q. And were you familiar with the current and prevailing prices that obtained in the open market for the various grades of salmon?

A. Yes.

Q. How many years have you been dealing in that product?

A. I have been in the fish business for 25 years.

Q. As a fish man?

A. Yes, sir.

Q. And during that period have you from time to time had occasion to handle salmon in a business way?

A. Yes.

Q. That is, handling it commercially?

A. Yes, sir.

Q. Now, is there a brand in the trade, in the business that is known as "No. 1 Tall Pink Salmon"?

A. Yes, sir.

Q. Is that a definite and a recognized kind of salmon?

A. Yes, sir.

Q. And are you familiar with the prices that obtained for that commodity, No. 1 Tall Pink Salmon, in the months of March and April, 1920?

A. Yes, sir.

[fol. 81] Q. February and March, 1920?

A. Yes, sir.

Q. How do those commodities sell? Do they sell by the tin or by the case?

A. The price is made by the dozen. There is a dozen price—a price of so much a dozen, and there are four dozen tins to a case.

Q. That is the ordinary and usual sized case?

A. Yes, sir.

Q. Now, what was the fair and reasonable market price in March, 1920, of a case of No. 1 Tall Pink Salmon?

Mr. Frank: I would like to present a question at this time, which is appropriate on this question now pending. There was no demand made on us until March, 1921,—a year later. I believe that inasmuch as there is no question that we did not take these goods wrongfully, the damages should be ascertained at the time we had an opportunity to make good, which would be at the time we first had a demand.

The Court: If you should prove to be right, then there would not be any proof of damages in the case.

Mr. Podell: I have no objection, if your Honor cares to hear my theory on the subject of damages—

The Court (interrupting): No, I will let you put in your proof on your own theory.

Mr. Frank: I do not wish to be understood as consenting to this, so I will take an exception.

The Court: Yes.

[fol. 82] Q. What is your answer?

A. What is the question?

The Court: The market value of this kind of salmon in February and March, 1920?

The Witness: The selling price?

Q. The fair and reasonable market price or value.

A. About \$2.05 a dozen.

Q. \$2.05 a dozen.

A. Yes, sir.

The Court: The selling price to whom?

The Witness: To the trade—to the export trade, to the jobbing trade in New York.

Q. That is, from manufacturer to jobber or exporter?

A. Well, we are jobbers ourselves. We bring these goods from the coast, and re-sell them to the export trade and to the wholesale grocery trade. We do not sell anything to retailers.

Q. And the price you have given of \$2.05 a dozen tins would be the price that you would charge at that time?

A. That is the price at which we were selling at that time.

Q. To wholesale grocers?

A. Yes, sir.

Q. And jobbers?

A. Yes, sir, and exporters.

Cross-examination.

By Mr. Frank:

Q. What was the name of the concern you were connected with?

A. Seaboard Trading Company.

Q. Is that concern connected in any way with the Philadelphia Warehouse Company?

A. No, sir.

Q. Have you ever done any business with the Philadelphia Warehouse Company?

A. No, sir, not that I am aware of.

[fol. 83] Q. Where is the place of business of the Seaboard Trading Company?

A. 12 Water Street.

Q. How many cans or boxes of salmon did you sell in January and February, 1920?

A. May I refer to a memorandum I have?

Q. Yes, surely.

A. Unless you want me to take the time, I should say it was somewhere between 2,500 and 3,000 cases.

Q. What kind of salmon did you sell? Tall cans or flat cans?

A. This is all pink salmon, tall.

Q. Is there not any other kind of salmon?

A. Oh, yes, lots of other kinds.

Q. Is there a difference in price between the tall cans and the flat cans?

A. The standard article in the trade is the tall can.

Q. But there is a difference in price, is there not, between the flat cans and the tall can, because the flat cans are the steaks, and the tall cans are the cuts?

A. But that does not apply to pink salmon. That is a higher grade of salmon.

Q. Is your testimony that the price of tall canned salmon and flat canned salmon at that time was the same?

A. I have not been asked that question.

Q. Well, I ask it of you now.

A. The flat cans were very difficult of sale. The low grade of salmon was not a success, in flat tins. It could not be sold as freely.

Q. Was there a different price at that time for the flat cans?

A. I do not—I should say that there never was a market in New York for one pound flat tins of pink salmon.

Q. Have you sold any of this Blue Boy Salmon?

A. Oh, yes, lots of it.

Q. When?

A. At different times.

[fol. 84] Q. In the months of March and February, 1920?

A. I don't think so.

Q. Was the price you have given us stationary in March and February, 1920?

A. These prices that I have here—

Q. (Interposing.) I say, was the price stationary? Now, you can answer that, can you not?

A. I was going to give you the range of prices.

Q. Just answer my question first. Then you can explain later.

Mr. Podell: I submit, your Honor——

The Court (interposing): No; he may have an answer to his question.

The Witness: The price seems to have been declining.

Q. Do your figures show when the decline started?

A. I think the decline started before the time you are speaking of. The decline started in the fall of 1919.

Q. And how long did the decline last?

A. Until the fall of 1921.

Q. And it was going down steadily all the time?

A. Practically, yes, sir.

Q. And were the prices you have in mind the same for large quantities as for small quantities of salmon?

A. There was a market at all times. We sold—on the 6th of January we sold——

Q. (Interposing): I did not ask you that. I asked you this question, and will you please answer my question: I want to know whether the price you could get for large quantities, say, in thousand case lots, was the same as the price you got when you sold one or two cases, or did that affect the price?

A. We never sell as small quantities as one or two cases. [fol. 85] Q. Well, take 15 or 20 or 30 or 40 cases. When you speak of small quantities, what does that indicate to your mind?

A. Around 50 cases.

Q. And a large quantity, I presume, would be 1,000 cases?

A. 1,000 or upwards.

Q. The prices that you get in the market for a small quantity are different than those you get for a large quantity?

A. Not materially different. The market would be the same. The market is the market.

Q. Are there any quotations on salmon of this kind that are published or publicly kept?

A. Daily.

Q. Are they official in any way?

A. I would not say they were official.

Q. Where are they kept?

A. The Journal of Commerce prints the quotations every day.

Q. Describing the salmon by brand?

A. No, by grades.

Q. By grades?

A. Yes.

Q. And not by brand?

A. No, sir.

Q. And have you any records here as to what the price of this grade of salmon that we have been asking you about, was in the month of January, 1920?

A. Yes, sir.

Q. What would you say that was?

A. We sold at \$2.10 and \$2.15.

Q. I did not ask you that. Do you know what the market price was? Not what you may have sold at.

A. Well, that was the market.

Q. \$2.10?

A. Yes, sir.

Q. What was it in, April?

A. I have the record here as far as March of that year.

Q. What I would like you to tell the jury is just exactly the extent of this decline. You told us the market declined [fol. 86] between January and April of 1920. You said it had been declining since November, I think?

A. Yes, sir. We bought salmon in March, 1920, at \$1.70.

Q. Where was that?

A. Deliver at New York.

Q. You bought it in New York?

A. Yes, sir.

Q. Did you ever sell any goods in New York at all, or did you merely buy for export?

A. I don't understand.

Q. Did you ever sell any goods in the New York market at all?

A. Certainly.

Q. To whom?

A. To every wholesale grocer in New York.

Q. Do you know that in March and April of 1920 this very Blue Boy Salmon was being sold in the market for \$1.65 and \$1.70 a can?

A. No, sir.

Q. You were in touch with the market, were you?

A. Yes, sir.

Q. And you knew what grocers and jobbers were paying for salmon?

A. I was supposed to.

Q. And you did not see anything about Seeman Brothers selling this salmon at \$1.65 and \$1.70?

A. I was about to tell you that in March——

Q. (Interposing.) No.

Mr. Podell (interposing): I object.

The Court: He may answer.

The Witness: I did not know anything about it.

Q. And you were in touch with the market?

A. Yes, sir.

Q. How did you come to be a witness in this case?

A. Mr. Arthur Williams, of R. C. Williams & Company, telephoned me and asked me if I would testify here.

[fol. 87] Q. Is he interested in this case in any way?

A. Not that I know.

Q. And did you ask Mr. Williams what his interest in the case was?

A. No.

Q. When were you asked to be a witness in this case?

A. I should say it was about two weeks ago.

Q. Did you speak to anyone besides Mr. Williams about it?

A. To Mr. Kahn.

Q. Is Mr. Williams a customer of yours?

A. We are business friends. We buy from him and we sell to him.

Q. A considerable quantity of goods?

A. At times.

Q. Well, in the last year you have done a great deal of business with that firm, have you?

A. Some business, yes, sir.

Q. Well, after Mr. Williams spoke to you, where did you go?

A. I didn't go anywhere.

Q. Did you speak to the attorneys in the case?

A. They rang me up.

Q. Did you speak to them when they rang you up?

A. Yes.

Q. To whom did you speak?

A. I believe it was Mr. Kahn.

Q. Where is your place of business?

A. No. 12 Water Street.

Redirect examination.

By Mr. Podell:

Q. What is the name of your concern?

A. Seaboard Trading Company.

The Court: He has already answered both of the last two questions.

The Witness: We have been there seventeen years in the same location.

[fol. 88] Q. You say you bought in March, 1920, at \$1.70?

A. Yes.

Q. What did you sell that same merchandise at?

A. At around \$2.00.

Q. When you gave the price at \$2.05, did you consider that it had been selling at a higher price in January, and that the market had declined to \$2.05?

Mr. Frank: I object to that question.

The Court: Sustained.

Mr. Podell: That is all.

Mr. Frank: That is all.

(Witness excused.)

Mr. Podell: That is our case, your Honor.

Plaintiff Rests.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Frank: The defendant moves to dismiss, first on the ground that it does not appear that the plaintiff in the case has any title to the merchandise in question; and, therefore, is not in position to question the title of the defendant.

I call your Honor's attention specifically to the fact that the only evidence in this case is that certain goods were placed in a storage warehouse, and that a warehouse receipt

was issued therefor. Now, there is absolutely nothing in the case to show the person who placed *in* the goods in the storage warehouse ever had title thereto, and I would like to call your Honor's attention to several decisions under the Warehouse Act, where the Supreme Court has held that the mere fact that a person puts goods in a warehouse and [fol. 89] a warehouse certificate is issued therefor, is, in itself, no evidence of any specific title. There is nothing to show that Cocarro owned these goods. There has been no evidence of title on the part of the plaintiff in any way in this case.

The Court: Overruled.

Mr. Frank: Exception. I also move to dismiss on the ground that the plaintiff has not shown that there is any money due it in this case.

It appears from the opening of counsel and from the evidence so far adduced in this case, that the plaintiff had possession of the warehouse receipts and the merchandise as security for a certain lien for moneys, or for a transaction in connection with moneys—whatever it may be. No evidence has been introduced in this case that any money is due or unpaid to the plaintiff, or that they have been in any way injured or damaged by any act that the defendant in this case has committed.

The Court: Overruled.

Mr. Frank: Exception. I also move to dismiss on the ground that the plaintiff has not made out a cause of action, nor has it made out the cause of action alleged in the complaint.

The Court: Overruled.

Mr. Frank: Exception. The complaint specifically alleges the transaction by which Cocarro became indebted to the plaintiff in a sum of money, which it is further alleged is still due the plaintiff and is unpaid, and there is no evidence——

[fol. 90] The Court (interposing): It is an unnecessary allegation. They can sue on possession.

Mr. Frank: Even though they may have been deprived of the possession of it, it does not follow that the damage they have been caused is represented by the value of the goods. There is no evidence here for anything except nominal damages.

The Court: What do you say to that, Mr. Podell?

Mr. Podell: If you Honor please, my friend on the other side confuses the theory of wrongful possession with a possession that he considers must come only by reason of larceny. What I mean precisely is this: There is a vital distinction in the cases between a man who steals merchandise and thereby wrongfully gets possession of it, and another man who has acquired possession by virtue of his position as bailee, and attempts to part with that possession to a third person. In the one instance, of course, a conversion takes place the minute the thief does the act or exercises any act. In the other case, the conversion will not take place until a demand is made.

Now, no one can say that the defendants were our custodians; no one can say that the defendants were, in the same sense, the rightful possessors of that merchandise when they first got it. They got title from someone who had no power to sell it to them. Their very first act was an act of wrongful dominion.

[fol. 91] The Court (interposing): But I am talking about the question of damages.

(Informal discussion, amongst counsel and the Court, off the record.)

Mr. Podell: Your Honor must admit that a warehouse receipt in our possession raises a presumption under the law that we have a right of possession, and the right of possession can be made the basis of a cause of action for conversion.

The Court: Yes, that is all true, and that *that* is why I overruled the first two motions. Now, I come to the question of the measure of damages. Does the fact that you show a right of possession justify the Court in submitting the case to the jury in the absence of specific proof of the extent of your right, or does a construction of a mere right of possession justify only merely nominal damages? I agree with you on the other two points.

Mr. Podell: Mere possession of goods is prima facie evidence of title; it is merely prima facie evidence. I do not claim it is anything more. However, we have the benefit of the presumption that the warehouse receipt is more than evidence of the right of possession; that it carries with it the presumption that we are entitled to the goods.

The Court: You can not strengthen your right by putting in an intermediary, the warehouseman.

Mr. Podell: No.

The Court: Your pleadings to the case, as made by you, [fol. 92] does not rest altogether on possession. You might have rested your case on possession, and gone ahead and let them put in their defense, but you, by anticipation, met the defense, and made, as part of your case, the allegation that you held as a pledgee. Now, the evidence so far shows that your pledgor authorized the taking of these goods. Therefore, if, as against your pledgor, who was the owner, you have no right to keep it, or if the evidence does not show that you have a right to keep it, then the defendant, out of your own case, has justified itself.

Mr. Podell: So far as the record stands—the technical condition of the record—it is just as effective as though Tom Jones or Jim Brown or someone else had given that order.

The Court: Yes, if you do not rely upon getting it from Cocarro, of course that is true.

Mr. Podell: There is no proof in the record to that effect. There is an allegation in the complaint to that effect, and under the circumstances, I submit to your Honor that that may be regarded as superfluous. I maintain that we have shown, for the purposes of a prima facie case, that we have shown by all fair inferences, which you must assume in our favor, on a motion of this kind, giving us the benefit of those presumptions, and that being the rightful possessor, we have this cause of action for conversion. But so long as this [fol. 93] has created discussion, and your Honor seems to be somewhat doubtful, I am going to ask the privilege of reopening the case, and putting Mr. Cosgrove on the stand to give the entire story.

The Court: Very well, I will grant you that leave.

Mr. Podell: Your Honor's view has such weight with me that I shall adopt the other course.

The Court: Very well. Tomorrow morning at ten-thirty, gentlemen.

Adjourned to Thursday, November 8, 1923, at 10:30 o'clock A. M.

New York, November 8, 1923.

WILLIAM P. COSGROVE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Cosgrove, what is your occupation, please?

A. Secretary of Philadelphia Warehouse Company.

Q. The plaintiff in this action?

A. I beg pardon?

Q. The plaintiff in this action?

A. Yes, sir.

Q. How long have you held that position?

A. Since December, 1916.

Q. The Philadelphia Warehouse Company is a Pennsylvania corporation, is it?

A. It is.

Q. And where is their principal place of business?

A. Philadelphia.

Q. How long have you been in business there?

A. Fifty-two years.

[fol. 94] Q. How long have you been connected with them?

A. Twelve years.

Q. Will you please explain to the Court and Jury what is the nature and character of its business?

Mr. Frank: I object to that question.

The Court: He may answer.

Mr. Frank: Not referring to this specific incident—

The Court (interposing): No, he is referring now to the general character of the business of this company, I suppose, to show it is really a company, after being in business fifty-two years.

Mr. Frank: I except.

The Court: Yes.

A. This company's business consists of the making of advances of its credit, namely, its promissory notes to those who are prepared to put up with us collateral security against their payment thereof.

Mr. Frank: I object to that and move that the answer be stricken out.

The Court: Overruled.

Mr. Frank: Exception.

Q. And has it been engaged in that business for the time that you have stated?

A. It has.

Mr. Frank: Same objection.

The Court: Same ruling.

Mr. Frank: Exception.

Q. Did you personally have charge of the Coccoaro account?

A. I did, sir.

[fol. 95] Q. When, for the first time did you meet Mr. A. J. Coccoaro?

A. In January, 1918.

Q. And who was it that introduced him?

A. Mr. A. U. Surprenant.

Q. And where did you meet him?

A. No. 10 Wall Street, as the office of Mr. Surprenant.

Q. Did you then and there have a talk with Mr. Coccoaro?

A. I did.

Q. Did you, in words or in substance, explain to him the character and nature of your business?

A. I did.

Q. Will you tell us, please, what you said to Mr. Coccoaro and what Mr. Coccoaro said to you?

A. Mr. Coccoaro was introduced to me by Mr. Surprenant, asking to use our service. I explained to him that if he had collateral which we could find, upon investigation, was readily marketable, and could confirm the value thereof, we were prepared to make advances to him of our promissory note on the basis of 75 per cent. of the market value of the merchandise, as determined by our inspection and independent appraisal.

Q. You mean you were to give him promissory notes for 75 per cent. of the value of the merchandise which he placed with you as collateral?

A. That is right. I explained to him that in connection with that our charge for the issuance of that paper to him and the use of our credit which supported that note, would

be three per cent. per annum, and that the sale of the note might be made through any one of his banks, if he desired to use them, or if he did not desire to use them, might be marketed through the regular channel for marketing paper of that type, namely, a note broker handling commercial [fol. 96] paper, and we preferred, because of the knowledge of our own brokers of the market for our paper, that he handle it through our brokers, they being in touch with many banks and bankers from Maine to California, who were accustomed to buying that paper over the last half a century. As result of that conversation, and in view of the arrangement made, he did deposit with us certain—

Mr. Frank (interposing): I object to that.

Mr. Podell: I will consent to that latter part being stricken out.

The Court: Yes.

Q. That ends, in sum or substance, the conversation held at that time?

A. I would say that it did.

Q. Now, thereafter did he from time to time deposit collateral with you or your concern, and did your concern advance him its paper?

A. It did.

Q. Did he, in words or substance, tell you of the channels he preferred to have the paper sold through?

Mr. Frank: I object to that as leading.

The Court: Sustained as leading.

Q. Did he talk with you in the first interview with respect to who was the broker—who was to be the broker who was to sell that paper?

A. The name of the broker was stated to him at that time.

Q. Did you give him the name?

A. I did.

Q. Just tell us what name you gave him?

A. F. B. Lewis & Co.

Q. Where are they located?

A. In Philadelphia.

Q. What talk was there between you and him as to what was to be done with those notes?

[fol. 97] A. There was no definite talk, excepting an assent on his part that they should be handled in the usual way through our note brokers.

Q. And those notes and the transaction that you have referred to, by which broker were they handled?

A. S. B. Lewis & Co.

Q. Now, we will come down directly to the transaction in suit. I think those are the papers in the matter in suit (handing papers to witness). When, for the first time, did Mr. Coccoaro talk to you about any salmon, so far as you can remember?

A. I prefer to refresh my memory from a complete account in the books, because there were two lots of salmon handled.

Q. Just tell me which book you want?

A. There is a little black book there, 61.

Q. I am talking about No. 1 tall pink salmon "Blue Boy"?

A. Well, with respect to that, the first transaction in which that was a part was November 18, 1919.

Q. Now, I want you to begin right from the very beginning of that transaction and tell us whom you met, where you met them and what was said?

A. I was requested by telephone from Mr. Surprenant's office to come over to New York, that Mr. Coccoaro desired to avail of our services. I went to Mr. Coccoaro's office for his convenience, and there met Mr. A. J. Coccoaro.

Q. Where was his office, please?

A. No. 1 Broadway, New York City.

Q. Yes. And fix the date, if you will, please?

A. On November 18, 1919.

Q. Yes.

A. He said he desired to deposit with us a certain lot of salmon—a thousand cases of "Blue Boy" salmon—against [fol. 98] which he desired us to issue our paper to him. He then delivered to me, first for inspection, an invoice showing his purchase of this salmon, which we did not retain. He also gave to me a certain pledge contract, which I hold in my hand and which is executed by him.

Mr. Frank: I object to any designation by the witness of the paper he has.

The Court: Yes.

Mr. Podell: I will consent.

Q. He then gave you, you said, a pledge contract—and that is stricken out. He gave you a paper, which you produce now?

A. Yes, sir.

Q. Did you have that with you, and did he sign this?

A. I did and he did.

Q. I wish you would give the detail of it. Whenever you gave him any paper, or asked him to sign anything, tell us how that took place, what you had with you and what he had with him—just exactly how it took place?

A. I filled in this form for him, in which he deposited as collateral security—

Mr. Frank (interposing): I object.

The Court: Yes.

Mr. Podell: I will consent that it go out. We will get to the paper. The paper will speak for itself.

Q. Just tell us in your own way what took place?

A. I filled in this particular form for him. I also filled in a form—

Q. (Interposing.) No. Let us get through with that first paper first. What did you ask him to do with regard to that form?

A. I asked him to sign it.

[fol. 99] Q. And did he sign?

A. He did.

Q. And did he give it to you?

A. He did.

Q. At that time?

A. At that time.

Mr. Podell: Now, I offer the document in evidence.

Mr. Frank: Let me see it, please.

Mr. Podell: Surely (handing paper to Mr. Frank).

Mr. Frank: May I ask the witness just one question?

Mr. Podell: I would rather not be interrupted.

Mr. Frank: I do not want to interrupt, but there is some change in the copy of this from the bill of particulars copy.

Mr. Podell: What is it?

Mr. Frank: The correction of a word or words "and discount," which is written in in the copy furnished us. This is a bill of particulars verified by Mr. Cosgrove. I would like to ask that one question.

By Mr. Frank:

Q. Mr. Cosgrove, you verified the bill of particulars in this case?

A. I did.

Q. And in this bill of particulars there appears to be what purports to be a copy of the exhibit that you hold in your hand?

A. Yes.

Q. In that paper in the fourth paragraph, amongst the printed words appears a caret, and following this interlineation of the words "and discount," in long-hand. That does not appear upon the original that you have?

A. They are erroneously inserted in that copy.

Q. They are erroneously inserted in the copy served on us?

[fol. 100] A. Yes. Those words are erroneously inserted in the copy that has been filed.

By Mr. Podell:

Q. The paper which you produce now and which I have offered in evidence, is it in the precise form, and does it contain the identical substance that it contained at the time when Mr. Coccaro signed it?

A. It does.

Mr. Podell: Now I offer it in evidence.

(Paper marked Plaintiff's Exhibit No. 21.)

Mr. Podell: Now, we will just let that rest for a moment.

Q. What next took place at that conference?

A. I also filled in and requested Mr. Coccaro to sign this form, which he did (handing paper to Mr. Podell).

Mr. Podell: I offer it in evidence.

(Paper marked Plaintiff's Exhibit No. 22.)

Q. What else occurred at that time?

A. Mr. Coccaro also delivered to me an order bill of lading, railroad bill of lading to the order, as I recall it—

Mr. Frank (interposing): I object.

Mr. Podell: I consent.

Q. I show you a paper and ask you whether that is the bill of lading (handing paper to witness)? Is that the bill of lading that he delivered to you at that time?

A. That is.

Mr. Podell: I offer the bill of lading in conjunction with the stipulation entered into by defendants with respect to the genuineness of the bill of lading.

[fol. 101] Mr. Frank: I object to that on the ground it is irrelevant and immaterial. We do not object on the ground of competency.

The Court: Are they the bills of lading for the goods?

Mr. Frank: We do not know.

The Court: Are they the bills of lading of the goods that the plaintiff claims were put into this warehouse?

Mr. Frank: That we do not know, either. We say that has not been shown in any way.

Mr. Podell: They do not know, but we do know. The face of the bill of lading shows a thousand cases of "Blue Boy" canned salmon.

Mr. Frank: There may have been a million cases shipped from California.

Mr. Podell: And this original bill of lading has been identified by the witness thus far as the bill of lading given to him by Coccaro at the time he advanced these promissory notes.

The Court: It may go in.

Mr. Frank: I except to its admission.

The Court: Yes.

(Paper marked plaintiff's Exhibit No. 23.)

Q. Now, what else took place at that conference?

A. He also delivered to me an insurance binder covering that merchandise.

Q. An insurance binder covering that merchandise?

A. Yes.

Q. Have you got that?

A. I have not.

Q. What became of that insurance binder?

A. I don't know.

Q. Did you keep it?

A. Probably.

[fol. 102] Q. Well, were there any other documents that he gave to you?

A. Yes, he gave me a check covering our commission.

Q. Have you got that?

A. I have not.

Q. Well, you deposited that, did you?

A. Yes, we deposited that.

Q. And what was the amount of that check?

A. In view of the fact that there was another advance made on that same day, I am not sure from these records that I have here whether the charges on it were included in this or not.

Q. Is there anything in this document that will refresh your recollection as to the amount of your commission on that transaction (handing paper to witness)?

A. The amount of our commission was \$30.48.

Q. That was the three per cent. that you spoke of?

A. Yes, that was the three per cent. per annum.

Q. Now, how much of a promissory note was requested of you?

A. \$5,900.

Q. And the \$30 and odd cents—\$30.48 was the amount of your compensation for that promissory note?

A. It was.

Q. Is that right?

A. Yes.

Mr. Frank: I object to that as leading.

The Court: Yes, it is leading.

Mr. Podell: He has substantially so testified.

Mr. Frank: He has testified.

Q. Now, Mr. Cosgrove, did you give him anything then and there at that interview?

A. I did not.

Q. What did you say to him, if anything, on that subject?

A. On the subject of the note?

[fol. 103] Q. Yes.

A. I said that if the salmon were found by us to be substantiated as to the value set on it by him, from inquiry made by me in the trade that day, I would, upon my return to Philadelphia the next day, see that the note called for was issued.

Q. And meantime what did you do with these documents that you have here? Did he give them to you? What were you to do with them?

A. He gave them to me.

Mr. Frank: I object.

Q. What was said on the score of what you were to do with those documents?

A. There was nothing further said that I recall.

Q. What happened to these documents? Did you take them back with you?

A. I took these documents with me to the office the next morning.

Q. Which office?

A. The Philadelphia Warehouse Company, in Philadelphia.

Q. In the meantime, had you made your investigations, or did you then make your investigations with regard to the salmon and its value?

A. I did.

Q. And what occurred, if anything, further, in that transaction, in Philadelphia or elsewhere? I mean, what was the next occurrence in that transaction?

A. On the morning following, namely, November 19th, 1919, there was issued in our office—

Mr. Frank (interposing): Unless the witness now is testifying of his own knowledge, I object.

The Court: Yes.

Mr. Frank: I don't know whether he is or not.

[fol. 104] The Witness: I am testifying of my own knowledge. I was there when it took place.

The Court: Then it may go in.

The Witness: There was issued in the office of the company at Philadelphia, a promissory note for \$5,900.

Q. Who signed it?

A. It is signed by the Treasurer, Edwards S. Dunn.

Mr. Frank: I object to the witness reading—

Mr. Podell (intterposing): They want to lay a proper foundation.

The Court: If he admits it—

Mr. Podell: I don't know that.

Mr. Frank: Oh, yes, we will not quarrel about it.

Mr. Podell: I offer it.

Mr. Frank: No objection.

(Paper marked Plaintiff's Exhibit No. 24.)

Q. Now, was there any other document of any kind given at that time on November 19th?

A. Not until after that note had been issued.

Q. Now, I want to ask you—I do not know whether I asked you before, whether you recognize the other signatures appearing on the bill of lading as the signatures of A. J. Coccaro & Co.? Right.

A. I do.

Q. And the next is Edwards S. Dunn, the Treasurer of your company?

A. Yes, that is right.

Q. That is his signature there on the back of that paper?

A. Yes, sir.

Mr. Podell: Referring to the bill of lading. Now, the document issued the next day is dated November 19, 1919, [fol. 105] on a printed form as you can see, and the note number, I suppose—

Q. In the upper left hand corner, is that the note number?

A. That is the note number.

Q. The signature is that of the President. What is it?

The Witness: F. M. Potts.

Q. Do you happen to know what the other date stamp is on that?

A. I do not.

Q. And attached are the necessary tax stamps, is that right?

A. That is right.

Q. Now, will you please then explain what course that paper took?

Mr. Frank: I do not know that I quite understand that question.

Q. What did you do with the commercial paper?

A. We delivered that to S. B. Lewis & Co.

Q. The broker?

A. The broker.

Q. And what did you receive in turn, and when did you receive it?

A. I will have to refresh my memory from the records.

Q. Yes. What records would you like?

A. I would like to have our letter book, please, of November 19, 1919.

Q. Yes. You had better come around and get it.

A. (The witness left the stand, and took a book from the counsel table). We received from S. B. Lewis & Co. this form (exhibiting paper).

Mr. Podell: I offer it in evidence (handing paper to Mr. Frank).

Mr. Frank: No objection.

The Witness: Also a cashier's check of the First National Bank.

[fol. 106] Q. A cashier's check of the First National Bank of—

A. Of Philadelphia, No. 19881 for \$5,834.20.

(Paper marked Plaintiff's Exhibit No. 25.)

Q. "Payable Girard." Does than mean Girard Trust Company?

A. Girard National Bank, Philadelphia.

Q. Now, what cashier's check did you get?

A. I don't have that, but the First National Bank representative, who is here, has.

Mr. Podell: Is the representative of the First National Bank here?

A Voice: Right here.

Q. Then what did you do with that check, Mr. Cosgrove?

A. We delivered that to the First National Bank of Philadelphia with a letter.

Q. Have you a copy of that letter?

A. I have a copy of that letter, yes (handing book to Mr. Podell). It covers another item also.

Mr. Podell: I offer it.

Mr. Frank: No objection.

Mr. Podell: Mark it, please.

(Paper marked Plaintiff's Exhibit No. 26.)

Mr. Podell: Will you mark that also—the check, a photo-static copy?

(Paper marked Plaintiff's Exhibit No. 27.)

Q. This photostatic copy appears to be undated. Do you recall when it was dated?

Mr. Frank: No, it has a date, but it is rather hard to see. November 19, 1919. You can see it if you get to the light. [fol. 107] Mr. Podell: This is once you are right. It is from Dunn, but it is dated Philadelphia, Pennsylvania, November 19, 1919. It is a little hard to see, but it is there (reading to the jury from Plaintiff's Exhibit No. 27).

Q. Now, did you enclose this check—the original of this check—in a letter, a copy of which I am going to read you now? The amount is the same?

A. I did not, but the record shows it to be so.

Q. Whoever sent the letter did?

A. Yes, Mr. John B. Edwards, Assistant Secretary.

Q. He sent that letter?

A. Yes, sir.

Q. Did you send Coccoaro a letter of which I show you a copy now (handing paper to witness)?

A. I did.

Q. And is that a true and correct copy?

A. I believe it is.

Q. Have you got it in this letter book?

A. Yes.

Q. Well, just turn to the letter book and we will take it that way (handing book to counsel).

Mr. Podell: I offer that.

Mr. Frank: I object to that letter on the ground that it is subsequent to the transaction and is simply a self-serving declaration, being no part of the transaction itself, and an attempt on the part of the plaintiff to explain what was done, the facts being already in evidence before the Court. Therefore, I think it is not admissible.

Mr. Podell: This is the first time I have seen the letter, and I would like to examine it. I would like your Honor to look at it (handing paper to the Court).

Mr. Frank: Your Honor will observe it was after the transaction was closed.

[fol. 108] The Court: How long after?

Mr. Podell: It was the very day that we sent the cashier's check, November 19th.

The Court: How is it anything more than a self-serving declaration? The facts so far as relevant here have been testified to. It is in reinforcement of his own testimony.

Mr. Podell: See if my conception of that is right; if it is not, I will withdraw the offer. So far we have shown that we have sent this check that was realized on the note to the bank, and with instructions to send it on to New York to the credit of Coccaro. We have not shown that we have given notice to Coccaro that that has been done for his benefit and account.

Mr. Frank: We will concede that the plaintiff notified Coccaro that they had caused to be deposited that amount in the Irving National Bank to his credit in New York City; but I object to these characterizations of their own conduct, in this letter.

Mr. Podell: I do not want that, but I want it as part of the transaction, showing that Coccaro got notice from us that the money was deposited to his credit.

The Court: Well, he concedes that to be the fact.

Mr. Podell: That being conceded, there will be no occasion to offer it.

The Court: Very good.

Mr. Podell: I will just ask your Honor to permit me to mark this letter for identification.

The Court: Yes.

[fol. 109] Mr. Podell: The offer is withdrawn for the present.

(Book marked Plaintiff's Exhibit No. 28 for identification.)

Q. Now, did you see Coccaro after these letters and checks had passed?

A. With reference to this particular transaction?

Q. Yes.

A. I did not.

Q. Well, what did you do then with the bill of lading, Mr. Cosgrove?

A. Sent it to the Yorke Storage & Warehouse Company.

Q. And did you then thereafter receive—

A. (Interposing.) With a letter.

Q. Did I understand you to say that a letter came from the Yorke Warehouse with this receipt?

A. No, I said that we sent a letter with the bill of lading to the Yorke Warehouse.

Q. Have you got a copy of that?

A. Yes, November 21st.

Q. November 21st?

A. Yes (handing paper to Mr. Podell).

Mr. Podell: I offer it.

Mr. Frank: I object to it as not material or relevant. The witness has already testified that he mailed the bill of lading to the warehouse. Now, what he said when he mailed it is not material or relevant. We do not object on the ground that it is a copy, but only on the ground that it is purely self serving and entirely immaterial.

Mr. Podell: Your Honor, the document is offered; but before I offer the document I want to ask the witness another question. I withdraw the offer for the present.

[fol. 110] By Mr. Podell:

Q. Did you, in conjunction with this document, likewise send an arrival notice? Just look at it, please (handing paper to witness).

A. We did.

Q. You mean that the goods had arrived in New York?

Mr. Frank: I object to that. The witness has no knowledge of that.

Q. Did you send such an arrival notice?

Mr. Frank: I object to that as a conclusion.

The Court: Yes.

Mr. Podell: He has so testified.

The Court: The question is leading.

Q. What document did you enclose in this letter of November 21st, besides the bill of lading?

Mr. Frank: If the witness has a copy, that ought to be produced.

Mr. Podell: We have not a copy. Has the original been found amongst the papers?

A voice: No.

Mr. Podell: The arrival notice—we have not the original. You do not dispute the original?

Mr. Frank: I don't know anything about it.

Mr. Podell: We cannot give you the arrival notice that the warehouse got November 19th. The testimony thus far is that these cases arrived at the warehouse, and that a warehouse receipt was issued therefor, and the records of the warehouse show that arrival. All I am doing now, to [fol. 111] complete the transaction, is to show that after the bill of lading was handed to us, we, in turn, upon receipt of the arrival notice, sent it on to the warehouse in exchange for which the warehouse receipt, Exhibit No. 2 already in evidence, was issued to us. It just completes the balance of the transaction.

Mr. Frank: If that is true, it would be very easy to have the railroad produce a copy of whatever paper was sent.

Mr. Podell: I do not think it is of sufficient importance to get the railroad's representative here to establish it.

Q. Did you send another paper, and enclose it with this letter, besides the bill of lading?

A. I did not write that letter.

Q. Well, did you see the letter before it went off at all?

A. Not to my knowledge.

Mr. Frank: I think we can save some time. I have no objection to the witness testifying that he sent a railroad arrival notice—

Mr. Podell (interposing): Then, it is stipulated that there was an arrival notice sent along with the bill of lading, to the warehouse, covering a thousand cases of "Blue Boy" canned salmon?

Mr. Frank: To that I object. I don't know what was in that arrival notice.

Q. Can you state what was in the arrival notice that you sent?

A. I cannot.

Q. Is Mr. Dunn available? Is he still in your service?

A. He is.

Q. Is he here?

A. He is not.

Q. Is he in Philadelphia?

A. He is.

[fol. 112] Mr. Podell: I will ask to have the letter marked for identification.

(Paper marked Plaintiff's Exhibit No. 29).

Q. After you had sent this bill of lading and arrival notice, did you then, in turn, receive Exhibit No. 2 in evidence, the warehouse receipt (handing paper to witness)?

A. We did.

Mr. Podell: Is the railroad representative here?

Q. What is your answer to the last question?

A. We did receive the not-negotiable receipt.

Q. Now, then, when this paper that is in evidence, this commercial paper, Exhibit No. 24, came due on January 20, 1920, what occurred, if anything, between you and Coccoaro?

A. Mr. Coccoaro requested an extension of the obligation covered by his pledged contract.

Q. And what was done?

A. We forwarded him a form to sign.

Q. And where is that form?

A. (Handing paper to Mr. Podell.)

Q. And did you then receive this form in Philadelphia?

A. We did.

Mr. Podell: I offer it.

Mr. Frank: No objection.

(Paper marked Plaintiff's Exhibit No. 30.)

Q. Now, there is an item here of \$69.33 to cover the discount. Did you have that note discounted?

A. We did.

Q. And who was it discounted with?

A. S. B. Lewis & Co.

Q. And have you got any of the forms there?

A. I have.

[fol. 113] Q. As to the charge that was made—give me the one you handed me by mistake a few moments ago?

A. (Handing paper to Mr. Podell.)

Q. Did you have to issue a paper to cover the renewal?

Mr. Frank: I object to the form of that question.

Q. Well, did you do it?

A. We did issue new paper.

Q. Just so that we will be entirely clear as to the mechanics, the other note, the one that came due on January 20th, who paid that?

A. The Chase National Bank out of our deposit account.

Q. That is, your concern paid it?

A. Exactly.

Q. And you issued this new paper that we have just shown to the other side?

A. We did.

Q. These two new notes?

A. Yes.

Mr. Podell: Will you mark these, please?

(Papers marked Plaintiff's Exhibit No. 31.)

Q. Is there any reason why they were—the amount was split up into two separate notes?

A. For convenience of sale of the paper. It is ordinarily sold in \$2,500 and \$5,000 notes.

Q. And so you split up the amount into two parts?

A. Yes.

Q. That is a mistake here, Mr. Cosgrove (indicating). That has \$2,500 and \$2,400 (handing paper to witness). \$2,500 and \$3,400?

A. It is a typographical error apparently.

Mr. Podell: Yes, the total is all right, but the amount here is erroneously stated. Payable to the Girard Trust Company.

[fol. 114] Q. Now, Mr. Cosgrove, this amount \$69.33, was that actually paid by your concern in accordance with the terms indicated on that statement?

Mr. Frank: I object to that. If there is a letter here covering the deposit—

Mr. Podell (interposing): Oh, no, that is not what I asked.

Q. Can you produce any cancelled checks showing the payment of \$69.33?

A. We cannot, for the simple reason that discount is deducted from the face of the paper, and the broker transmits the net of it.

Q. Have you any correspondence on the subject?

A. We have not.

Q. What did you receive?

A. The identical proceeds mentioned in that memorandum of the broker.

Q. You had previously, as I believe you testified, met and paid the former outstanding note?

A. We had.

The Court: You mean the Chase Bank paid it for you?

The Witness: Yes, through our account.

Q. And to grant this renewal to Coccoaro you had to——

Mr. Frank (interposing): I object to the form of the question.

The Court: What did you do, then, with these two papers, after you had paid the first note?

A. Those two notes were issued and delivered to S. B. Lewis & Co. for discount.

The Court: Before or after you paid or the Chase — paid?

[fol. 115] The Witness: On the same day.

The Court: Before or after the payment was made?

Q. Could you say that?

A. That I could not say, your Honor.

The Court: You carried a balance in the Chase Bank?

The Witness: We did.

Q. What did you do when these notes came due on March 23, 1920?

The Court: You have not shown who got the proceeds of these notes, or whether it was a check or otherwise.

Q. Did you get a check from the broker for the amount of \$5,830.67?

A. We did.

Q. And that you deposited to your account in the Chase Bank?

A. Together with the discount which Mr. Coccoaro had defrayed to make up the par of the note that had matured.

The Court: I did not know Coccoaro was to pay this discount at the maturity of the note. That is a new one. That has not been testified to before, or else I have missed it.

Mr. Podell: What is that, your Honor?

The Court: He just said that he deposited this check of

Lewis' for the discount of the renewal notes, together with the discount that Coccoaro was to pay on the first note.

Mr. Podell: Oh, no.

The Court: That is what you said?

The Witness: I was in error.

The Court: Did you not say that?

The Witness: I do not recall that I did.

[fol. 116] The Court: I may have misunderstood you.

Mr. Podell: No, your Honor; when the first note was issued on November 19th, 1919, we charged him——

The Court (interposing): Yes, I know that has been testified to. That is why I was surprised that he now said, as I understood him, that the discount on the first note was paid by Coccoaro at maturity. I probably misunderstood him.

Q. As matter of fact, what did Coccoaro pay to you on the renewal?

Mr. Frank: Is that paper in evidence?

Mr. Podell: Yes.

Mr. Frank: The renewal of January 20th?

Mr. Podell: Yes.

Q. What did he pay to you?

A. He paid us the discount which the broker deducted from the sale of those notes.

Q. Discount for what paper?

A. For the new paper, and our commission for the use of that new paper.

Q. Did you receive in either case from Coccoaro anything more than the three per cent.?

Mr. Frank: I object to that as calling for a conclusion.

The Court: Yes.

Q. Why, how much did you or your company receive on both these renewals?

A. Three per cent. per an-um.

Mr. Frank: No, I mean in dollars.

Q. Yes, in dollars and cents?

[fol. 117] Mr. Podell: I think there will be no objection to that last answer standing on the record?

Mr. Frank: I object.

The Court: Yes, that is a conclusion.

Q. What did you actually receive in dollars and cents?

A. We actually received \$44.63.

Q. For what?

A. Commission.

The Court: He is asking you what you actually received from Coccoaro. You stated a few moments ago that you received your commission plus Lewis' discount, did you?

The Witness: We did. We received the amount mentioned first in the extension form, which includes the discount, the commission.

Mr. Frank: I object to what it includes. We have the exhibit in evidence.

The Court: Yes.

Q. Now, I repeat my question, Mr. Cosgrove. How much did you get for your services from Coccoaro—

Mr. Frank (interposing): I object.

The Court: That is a conclusion.

Q. Did you have any talk with Mr. Coccoaro as to what he was to pay you?

Mr. Frank: I object to that. It has been fully testified to.

The Court: I think so, unless he had a further talk.

Mr. Frank: If so, I have no objection.

Q. Did you have a further talk?

A. We did not.

[fol. 118] Q. What commission had you charged him in previous transactions?

Mr. Frank: I object to that.

The Court: That has all been testified to.

Mr. Podell: I was afraid it might not be clear to your Honor.

The Court: It is perfectly clear to me.

Mr. Podell: It may not be clear to the jury.

The Court: The only lack of clarity on my part was what I thought he said, but what he says he did not say. I probably misunderstood him.

Q. Is this the letter that you received from Coccaro when he sent a check for \$101, according to this note(handing paper to witness)?

A. We did receive that letter.

Mr. Podell: I offer it.

Mr. Frank: I have no objection to that letter.

Mr. Podell: It will be conceded that there is reference made——

Mr. Frank (interposing): I will not object to it at all.

Mr. Podell: You will not object to my stating that there is reference here made to another transaction?

Mr. Frank: No objection.

Mr. Podell: I offer it.

(Paper marked Plaintiff's Exhibit No. 32.)

Q. The \$8,500 is a transaction that has nothing to do with the salmon, has it?

A. It has not.

Q. Now, what occurred on the 23rd of March when these [fol. 119] second two papers or promissory notes in evidence became due?

A. Mr. Coccaro requested another extension.

Q. And did you grant it?

Mr. Frank: May I ask just a question? The witness says he requested. Was this a conversation or some more letters?

Q. Did you have a letter from him, or was it by conversation?

A. I cannot say definitely in this case, but it was his custom to telephone and ask that we extend——

Q. (Interposing.) Well, you do not know whether——

A. (Interposing.) The record will show in our letter book whether he requested it or not by 'phone.

Q. In any event, did you grant the extension?

A. After we had requested that he pay \$700 on account of principal, we extended in the sum of \$5,200.

Q. In any event, when these notes became due, which are part of Exhibit No. 31, were those met by your concern?

A. They were paid by the Girard National Bank out of our deposit account at that bank.

Mr. Podell: I offer in evidence the letter shown to defendants' counsel (handing paper to Mr. Frank.)

Mr. Frank: I object to that letter, except the statement in it that they asked for the extension of a loan. There are a great many other things in it.

Mr. Podell: I do not care about the other things.

Mr. Frank: I think the first paragraph ought to go in. I object to anything except what refers to this transaction. [fol. 120] Mr. Podell: I would like to offer the first paragraph, and also the part which requests an extension (handing paper to the Court.)

Mr. Frank: I object to the other part of the letter.

The Court: I sustain the objection.

Mr. Podell: Your Honor will allow me an exception?

The Court: Yes.

Mr. Podell: Then, what will we do? Just mark it?

The Court: Mark it for identification and read into the record the part which is admitted.

(Paper marked Plaintiff's Exhibit No. 33 for Identification.)

Mr. Podell: This is dated March 20, 1920, addressed to the Philadelphia Warehouse Company, and among other things, it says: "In the meantime, we would ask for an extension of our loan for \$8,500 and \$5,900 due on the 23rd inst."

Q. The \$5,900 is the salmon transaction, is that right?

A. That is right.

Q. Did you answer that letter with a letter of which I show you a copy (handing paper to witness)? See if you can find it in your letter book, March 24, 1920?

A. We did send such a letter to Mr. Coccoaro.

Mr. Podell: I offer it in evidence.

Mr. Frank: I object to any part of this except the first paragraph acknowledging receipt of money, and closing two new forms for renewal.

[fol. 121] Mr. Podell: Ordinarily, I do not think it is for the good of any one to emasculate a letter.

Mr. Frank: I object to that statement. I am not emasculating anything.

Mr. Podell: I am not saying that you are. If you will permit me to address the Court—

Mr. Frank: I have objected.

Mr. Podell: Well, on that objection I would like to be heard.

The Court: Yes.

Mr. Podell: I do not think it is fair to either side or to the case to just cut out portions of letters, because I think the portions that are retained do not convey the true meaning.

Mr. Frank: Will your Honor look at the letter and satisfy yourself?

The Court: If that principle were generally adopted, just because one line happens to be relevant or admissible to a case, every self-serving declaration contained in any document that came into the case would have to be admitted. I cannot agree to the principle. As to the specific application in this case, of course, I will have to examine the document.

Mr. Podell: These were letters written at the time of the transaction.

The Court: That would not make any difference.

Mr. Podell: There was no contemplation of any lawsuit at that time?

The Court: That would not make any difference.

[fol. 122] Mr. Podell: And the transaction was going on between us and Coccaro.

The Court: But all the correspondence between you and Coccaro is not material here.

Mr. Podell: Counsel claims he did not know anything about——

The Court (interposing): I know, and he can get all the information he wants for his own benefit.

(Informal discussion amongst counsel and the Court, off the record.)

The Court: Which parts are agreed to in here? To which parts of this letter have you no objection?

Mr. Frank: The first paragraph and the last paragraph, "We are enclosing two new forms." The repetition of the conversation I object to, and the statement of what they did on their own account I object to.

Mr. Podell: I do not care anything about those two paragraphs. I will just offer the first and the last.

Mr. Frank: Then we are agreed.

The Court: Then you are agreed.

Mr. Podell: Yes, sir. Just mark it for identification and I will read it.

(Paper marked Plaintiff's Exhibit No. 34 for identification.)

Q. Where are the forms? A. Have you got the forms?

A. I have the one with reference to this transaction (handing paper to Mr. Podell).

Q. Yes, that is the one I mean. How much was applied on account of reduction of this last note?

A. \$700.

[fol. 123] Mr. Frank: What is that?

(Answer read.)

Mr. Podell: That face amount was \$5,900, and the face of this note is \$5,200.

Mr. Frank: All right.

Q. Whose notation is that in pencil annexed to these papers, whose handwriting is it (handing paper to witness)?

A. Mr. Dunn, the Treasurer of the Philadelphia Warehouse Company.

Q. Do you recognize that?

A. I do, sir.

Mr. Podell: I offer the whole thing in evidence.

Mr. Frank: I object to it. I object to the private memorandums of Mr. Dunn.

Mr. Podell: All right; then I will offer the extension note signed by Cocco, the new note—

Mr. Frank (interposing): You had better offer them separately. No objection to the paper signed by Cocco and the note signed by Mr. Dunn, but I object to the other paper as not binding on us.

Mr. Podell: Please mark these.

Q. I show you the other paper just referred to, and I ask you whether that was received from the Continental Bank on the date it is dated?

A. From the Centennial National Bank?

A. From the Centennial National Bank.

A. It was, on March 24th.

Q. And at what bank was the renewal note of March 20th discounted?

Mr. Frank: I do not know whether Mr. Cosgrove knows anything about that transaction, or whether he handled it at all.

[fol. 124] (Papers marked respectively Plaintiff's Exhibits Nos. 35 and 36.)

The Witness: That is a renewal of that obligation, and that note which matured.

Q. Well, did you personally handle the transaction, do you recall?

A. I don't recall.

Q. What do your records made at the time show with respect to it?

Mr. Frank: I object to that. There is no dispute here that Coccoaro signed that paper.

Mr. Podell: That is not what I am talking about.

Q. Have you got the records in your books of account kept at that time?

A. We have.

Q. And have you entries there covering the matter of the discount of the note of March 20, 1920?

A. Yes.

Q. And do you recognize the handwriting—get the book first, whatever book is necessary.

Mr. Frank: You do not have to do that. If you will indicate what you are after, probably we will not object.

Mr. Podell: I am laying a foundation for the substance of this—

Mr. Frank (interposing): I object. If the witness wants to testify that they paid the Centennial National Bank \$61.68, I will not object.

Mr. Podell: All right.

Q. And the discount of this new note of March 23, 1920, for \$5,200, did you pay or did the Centennial National Bank deduct from the face of that note a sum of \$61.68, being seven per cent. of the face amount for sixty-one days?

A. It did.

[fol. 125] The Court: Being seven per cent?

Mr. Podell: Yes, seven per cent they pay; that is, to the bank that discounted the paper.

The Court: For what period of time?

Mr. Podell: For sixty-one days.

The Court: Then, at the rate of seven per cent per annum for the time?

Mr. Podell: Yes, at the rate of seven per cent per annum.

Q. Is that the statement from the bank with respect to that discount (handing paper to witness)?

A. It is.

Mr. Podell: Now, these two are marked in evidence. I offer that paper in evidence.

Mr. Frank: I object to it as incompetent, irrelevant, immaterial and not binding on the defendants.

The Court: Sustained.

Mr. Podell: Mark it for identification.

(Paper marked Plaintiff's Exhibit No. 37 for Identification.)

Mr. Podell: The note—renewal notes—is dated March 23, 1920, for \$5,200. It is due on May 24, 1920. It is in the same form as those I read before, signed by Mr. Dunn, the Treasurer, payable to themselves (reading).

Q. Now, I don't know whether I asked you the question, but before you arranged for the discount of that note, or at about that time, did you or your concern meet the obligation on the other two notes outstanding?

A. We did.

Q. In the sum of the face amounts of those notes?

[fol. 126] A. Aggregating \$5,900, through the Girard National Bank, of Philadelphia.

Q. And that was the face amount of both those notes?

A. That was.

Q. Now, on May 24th when that note became due, what happened?

A. We paid it.

Q. Paid the full face amount of it?

A. Fifty-two hundred dollars through the Girard National Bank, Philadelphia.

Q. And what occurred?

A. Mr. Coccaro was unable to make payment of the note.

Q. Did you talk with him?

A. I do not recall that I talked to him.

Q. When again did you meet Coccaro?

Mr. Podell: Can we stipulate the date of the bankruptcy?

Mr. Frank: May 27, 1920.

Mr. Podell: It is stipulated that on May 27, 1920, a petition in bankruptcy was filed against A. J. Coccaro & Co.

Q. Is that your recollection, or would you not know the date?

A. I would not know that date.

Q. Well, shortly thereafter or about that time were you advised of the bankruptcy of Coccaro?

A. We were.

Q. And what then did you do?

A. We made demand on Mr. Coccaro for the payment of his obligations.

Q. Well, now, in this transaction that he signed there is this clause three that I have read with regard to the property pledged, together with any other property pledged, to constitute the collateral to all his obligations. At that time, on May 20th or 27th, according to your records what was the indebtedness of Coccaro to your concern?

[fol. 127] Mr. Frank: I object to that as a conclusion on the part of the witness.

The Court: Sustained.

Mr. Podell: That would simply mean we would have to take up each one of these transactions separately, then.

The Court: Yes, I know. With the aid of counsel you may be able to do that without much difficulty.

Mr. Podell: It is not so much the difficulty as it is the length of time that it takes.

Mr. Frank: It will not take so much time. You can hand him the originals of which you gave us a bill of particulars, and let him identify them.

Q. What did you do with regard to the salmon, if anything, after you found out about the bankruptcy? What did you do personally?

A. What did I personally do?

Q. Yes.

A. I visited the Yorke Warehouse to ascertain if the collateral was there.

Q. Had you ever been to the Yorke Warehouse before that?

A. Frequently.

Q. With regard to this collateral?

A. Not with regard to this collateral, but with regard to other collateral.

Q. And what did you find at the Yorke Warehouse?

A. I found there was none of our merchandise remaining in the warehouse.

Mr. Frank: When was that?

Q. What is the date as near as you can remember?

A. I don't recall, but can refresh my memory from a letter in our book.

[fol. 128] Mr. Podell: We will get that date before we are through.

Q. Now, Mr. Cosgrove, will you look at the account I show you in your books of account? First, what do you call this book which I show you?

A. This is the ledger account.

Q. Ledger account of what?

A. Philadelphia Warehouse Company accounts—all accounts that it has.

Q. By whom is that kept?

A. It has been kept by separate bookkeepers.

Q. In the employ and service of the Philadelphia Warehouse Company?

A. Yes, sir.

Q. And were those entries, to your knowledge, in that book made in the regular course of business?

A. They were.

Q. By people regularly employed for that purpose?

A. Yes.

Q. And performing their duties as such employees?

A. Yes.

Mr. Frank: Do you want to show that this is an authentic real book of the company.

Mr. Podell: Yes.

Mr. Frank: It is conceded.

Q. Is that the ledger?

A. Yes, that is, of the Philadelphia Warehouse Company.

Q. Kept in the regular course of business?

A. Yes.

Q. Now, does that book contain the account of A. J. Coccaro with your concern, yes or no?

A. It does.

Q. And to your knowledge is that a true and correct statement of the account between your concern and Coccaro?

[fol. 129] Mr. Frank: I object to the question, inasmuch as this answer and this alleged account reflects a number of transactions of the same character of those which have been offered to the Court and jury already, consisting of a number of loans and a number of renewals, in which various items are questioned, and the witness's conclusion or the bookkeeper's conclusion as to what they show is not binding upon us.

The Court: Sustained.

Mr. Podell: I except. Will you mark it for identification, please?

(Book marked Plaintiff's Exhibit No. 38 for Identification.)

Mr. Frank: May I make a suggestion?

Mr. Podell: Yes, surely.

Mr. Frank: If you will produce the originals of the other papers that were furnished us as copies in the bill of particulars and have the witness identify them, I will not make any objection to having them go in evidence, and will direct my cross examination solely to the originals of those that I have questions to ask about.

Mr. Podell: I do not know just how far that goes.

Mr. Frank: Just offer the originals, and let the witness say, "That is the paper that Coccaro signed, and that is the amount that we gave Coccaro," and have him say what Coccaro paid him on account. I will only ask him about the things that interest me; not about the rest.

Mr. Podell: All right, we will do that; we will accept your suggestion.

[fol. 130] Mr. Frank: Will you- Honor indulge us just a moment? We may save a lot of time, if I have a chance to see some of these papers.

The Court: All right.

Mr. Podell: Your Honor, my friend wants to look at our books covering the accounts of Coccoaro, with a view to simplifying the offer of proof, and it will take him a little time to check up these figures, and it may save time if your Honor will take an adjournment now, and give us the benefit of that time. I am certain that we can get together.

The Court: Very well. Two o'clock, gentlemen.

Recess.

Afternoon Session

WILLIAM P. COSGROVE resumed the stand:

Direct examination continued.

By Mr. Podell:

Mr. Podell: I understand that my adversary will permit these two papers to go into evidence. The one is a statement of the account as prepared in behalf of the defendant, or by some one in behalf of the defendant, which shows a little more in detail the statement of account—

Mr. Frank (interposing): Pardon my interruption. I think I had better explain what they are.

Mr. Podell: Suppose we let them speak for themselves?

(Informal discussion off the record.)

[fol. 131] Mr. Frank: We consent to the receipt in evidence of the paper I now offer, which is a statement purporting to be exhibits attached to the bill of particulars, and according to the books of the Philadelphia Warehouse Company here produced, showing the various amounts paid and received by them, arranged according to date.

Mr. Podell: In their dealings with A. J. Coccoaro & Co.

Mr. Frank: Yes, in their dealings with A. J. Coccoaro & Co. between November 8, 1919, and May 20, 1920.

Mr. Podell: Which includes all of the transactions had between them and A. J. Coccoaro?

Mr. Frank: No, which includes all transactions referred to—the bill of particulars. There are transactions which are not referred to in the bill of particulars, of some years before.

Mr. Podell: But not between those dates.

Mr. Frank: Yes.

Mr. Podell: Mark it by consent. You can mark it as a plaintiff's exhibit.

(Paper marked Plaintiff's Exhibit No. 39.)

Mr. Frank: We also have no objection to offering in evidence the paper attached to the plaintiff's bill of particulars showing the various transactions had between the Philadelphia Warehouse Company and A. J. Coccaro & Co., between November 8, 1919, and May 20, 1920, transaction by transaction, as the plaintiff claims it appears on its books.

[fol. 132] By Mr. Podell:

Q. Is that a correct statement, that it appears on this statement?

A. I do not mean in the same form, but in substance?

Mr. Frank: No, not in the same form, but in substance?

A. I would say yes, this agrees with the books.

(Paper marked Plaintiff's Exhibit No. 40.)

Q. Now, on Exhibit No. 39, Mr. Cosgrove, under the head of "Discount" there appear certain items beginning with November 8th, down to May 11. I ask you whether those items were paid out by the Philadelphia Warehouse Company to the concerns who discounted those notes (handing paper to witness)? I do not mean necessarily at the time of discount; they may have been paid at the time when the face amount of the note was paid, but were they all paid out?

A. All of the items shown as discount, were paid out to the note brokers.

Q. That is to say, the Philadelphia Warehouse Company, as such, kept none of those moneys that are under the head of discount?

A. That is correct.

Q. The figure appearing on Exhibit 40 does not include interest due?

A. It does not.

Q. Now, did you find any of the collateral at all that had

been put up on these transactions at the time you went to the warehouse?

A. I found in all about one dozen cases of odd lots that could not be identified as belonging to us, but which certain of the employees indicated might belong to us.

[fol. 133] Q. In any event you took none?

A. We did not.

Q. And you have realized nothing on the collateral that he put up?

A. We have not.

Q. And there is this balance of \$59,000 and odd due you?

A. Yes.

Q. No part of which has ever been paid?

A. There is.

Q. Plus the interest that may be due thereon?

A. There is.

Mr. Podell: Now, just so that we may have the basic data on this—

Mr. Frank (interposing): I have no objection.

Mr. Podell: Let me mark them all in evidence. We will have all the promissory notes and the basis for what appears on those statements.

Q. Are they all included in these folders?

A. They are.

The Court: Does the pledge of the warehouse receipts cover any and all indebtedness?

Mr. Frank: There was a clause in this that says so.

The Court: It makes it applicable?

Mr. Podell: Yes, your Honor.

The Court: Does the record show as to these other transactions, or are you stipulating now that they were of the same character?

Mr. Podell: Yes, your Honor.

The Court: The discounts made in a similar way, and the commission in the same way as this particular transaction?

[fol. 134] Mr. Podell: Yes.

Mr. Frank: The original documents appear.

Mr. Podell: And the original documents in each instance are going in.

The Court: Yes, but I mean—

Mr. Podell (interposing): The manner and form of procedure was the same.

Mr. Frank: I am simply stipulating that these two résumés shows what those papers reflect.

Mr. Podell: Shall I offer them separately?

Mr. Frank: No, offer them as one exhibit.

Mr. Podell: All right.

(Papers marked Plaintiff's Exhibit No. 41.)

Mr. Podell: May it appear upon the record that Exhibit No. 41 includes five files bearing date respectively November 8th, 12th, 18th, and December 31, 1919, and one bearing date January 5th—that should be 1920, should it not?

Mr. Frank: Yes, I suppose so.

Mr. Podell: Make this 1920 instead of 1919.

Mr. Frank: I suppose that relates to the cover; not the contents?

Mr. Podell: Well, it is misleading.

Mr. Frank: Yes. All right, correct it.

Mr. Podell: You may examine.

Cross-examination.

By Mr. Frank:

Q. Now, Mr. Cosgrove, you testified on your direct examination that you had charge of this Coccoaro account, is that correct?

A. That is correct.

Q. That is, on each occasion you came to New York and [fol. 135] spoke to Coccoaro about the terms of the loan?

A. That is true.

Q. These loans that we are discussing in this case consist of the following loans which, in your bill of particulars, you denominate as A, B, C, D, E and F, is that right?

A. That is correct.

Q. The first one was on November 8th for a loan of \$16,000?

A. Right.

Q. And the transaction after the preliminary details that you have explained, was that the Philadelphia Warehouse Company sent to the Irving Bank at New York a check for \$15,813.33, is that right?

A. That is right.

Q. And that represented the \$16,000 less the sum of \$186.67, which was the discount and brokerage charge of S. B. Lewis?

A. That is correct.

Q. And you received from Coccoaro at that time, as you testified on direct, a check for \$83.20?

A. That is correct.

Q. And that is what the Philadelphia Warehouse Company got out of the transaction, plus \$3.20 government stamps?

A. That included the \$3.20.

Q. \$80 is what the Philadelphia Warehouse Company got?

A. Yes.

Q. Now, that transaction you came to New York and spoke to Mr. Coccoaro about?

A. Yes.

Q. In fact, in each one of these various transactions, with one exception, you came to New York and made the arrangements with Mr. Coccoaro?

A. Yes.

Q. And that one transaction was one in which Mr. McAndrew, of Mr. Coccoaro's office, said that they could not wait for the check to come to the Irving in the usual course, that he would come over and get it; is that right?

[fol. 136] A. That had nothing to do with the making of the advance. That was merely the receipt of the proceeds.

Q. Then the making of the advance on that occasion also took place between you and Coccoaro in New York City?

A. The receipt of the documents did.

Q. You made the arrangements with Coccoaro in New York?

A. So far as taking documents from him was concerned.

Q. But you made the deal—when you left there, there was nothing to do except go through whatever procedure you have outlined, to get the money?

A. That is true.

Q. In other words, when you left Coccoaro's office that day that was a deal that was closed?

A. No, I beg your pardon; subject to a satisfactory appraisal and examination of the collateral.

Q. All right. Who did that satisfactory appraisal?

A. Many independent sources, dependent on the type.

Q. You testified on one of these transactions that you answered Mr. Podell about, that you went around and asked different people in the trade whether the canned salmon was worth about what it showed on the bill of lading?

A. That is true.

Q. And that is what you referred to as a satisfactory appraisal, is it?

A. In that instance, yes. In others, it was necessary to draw samples and submit them.

Q. You did that likewise, did you?

A. Yes, I did.

Q. The only time you ever did that in any of these transactions was when the original loan was made?

A. Yes.

Q. That is, when a note was renewed or a loan reduced, [fol. 137] or anything, you had already satisfied yourselves as to the value of the goods; you did not go through that performance again?

A. We did not.

Q. So, then I am correct in stating that in each one of those transactions that are included in this bill of particulars of yours, you came to New York City and made the arrangement with Coccareo, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods then the deal was closed so far as the arrangements between you and Coccareo was concerned?

A. So far as the agreement to do what we undertook to do was concerned.

Q. Yes. Now, on November 18th there was another transaction for a loan of \$8,500 and of \$5,900; that is, the two transactions that are described in the bill of particulars as C and D took place on the same date?

A. That is correct.

Q. And you got checks, as this Exhibit 39, shows, for what the Philadelphia was to get in the transaction, and you, the Philadelphia Warehouse Company, remitted to the Irving Bank to the account of Coccareo a certain sum, which was the amount of the loan, in this case \$8,500 and \$5,900, and on that date you remitted to the Irving Bank in New York \$14,239.40?

A. That is correct.

Q. And the same thing took place with the loan of \$36,000 and the loan of \$5,700? If you want to refresh your recollection, I have no objection to your looking at this (handing paper to witness). You can keep it up there.

Mr. Frank: May I have the exhibit of November 18—that is Exhibit 21?

[fol. 138] Q. These papers that you gave to Coccaro were shown to Coccaro, and you had him sign, and he signed in your presence in New York?

A. That is correct.

Q. The Philadelphia Warehouse Company did not have any office in New York, did it?

A. It did not.

Q. How frequently were you in New York during that period?

A. That is hard for me to say at this time.

Q. Well, you were here frequently—practically every day, were you not?

A. No, I was not.

Q. Three or four times a week?

A. I would not say so.

Q. Now, coming down to March, April and May, you were here practically every day, were you not?

A. 1920.

Q. 1920?

A. I would not say that I was.

Q. Do you remember that between the first of May and the date of the Coccaro failure you collected for the Philadelphia Warehouse Company about \$20,000?

A. I do not recall collecting it. You may have received that amount from Coccaro.

Q. Well, you received a part of that before any of the notes or renewals were due, did you not?

A. Probably. The books will tell whether or not that is true.

Q. Will you look at the statement, please (handing paper to witness)?

Mr. Frank: I withdraw the question and will put it in another form.

Q. The reason that those payments were being made to the extent of \$20,000 in that month, was that you were after Coccoaro all the time, were you not?

A. Not altogether. In some cases he received a release [fol. 139] of collateral for the payments made.

Q. And he had never paid you any more in any month, other than the month of May, than about a thousand or two thousand dollars, had he?

A. I do not recall. I would have to look at the books.

Q. I suppose the memorandum will show. Where did you make your headquarters in New York when you came here from Philadelphia in regard to these transactions?

A. I had no headquarters in New York.

Q. Did you go to the office of the people that you dealt with in each instances, to have these discussions, or did you have some place that you arranged to meet them at?

A. There were times when I met them in the office of A. U. Surprenant, and other times when I met them directly in their own offices.

Q. How frequently did you have people meet you in Surprenant's office?

A. Only when requested to do so by them and Surprenant.

Q. Can you not give us any idea how frequently that was, whether it was an everyday occurrence or once or twice a month?

A. I would say that in the major portion of the cases that was not so.

Q. You mean it was not every day?

A. It was not every day, and I did not meet them generally in his office.

Q. You did business for other people than A. J. Coccoaro & Company with Surprenant, did you not?

A. We did.

Q. And you were having transactions, delivering and having papers like these signed with other concerns in New York, during the period between November and May, with other concerns here than Coccoaro, were you not?

A. Yes.

[fol. 140] Q. That is, you had other New York customers?

A. We did.

Q. Quite a few of them?

A. Yes.

Q. And you would come here from Philadelphia and do the same things in those instances, and see those people at their offices or Surprenant's office and then produce these papers and discuss the terms?

A. That is true.

Q. Now, these papers you had signed in New York in every instance; that is, papers of the same form as this Exhibit 21?

A. You mean in every instance referring to Coccaro's loans?

Q. Yes, just to Coccaro I am referring.

A. Yes.

Q. And you brought these printed papers, like Exhibit No. 21, with you and had the parties that you were doing business with sign them, is that it?

A. I did.

Q. And that was a standard thing with you?

A. It was.

Q. To have them sign these printed papers?

A. It was.

Q. I call your attention to Exhibit No. 22, which you see was signed on the same date as this Exhibit 21. That was a printed form, likewise, was it not?

A. It was.

Q. And it said to please deliver to your note brokers, S. B. Lewis & Company. Now, they were your note brokers, were they not?

A. They were ours as well as others.

Q. Well, you printed in here "your note brokers" in that printed form?

A. That is true.

Q. And you gave them a very large amount of business, did you?

A. We did.

Q. And the only way that Coccaro knew them or heard of them was through your giving him this printed form [fol. 141] with their name printed in?

A. I believe so.

Q. Because they were a Philadelphia concern?

A. They were.

Q. Where is their place of business in Philadelphia?

A. Philadelphia National Bank Building.

Q. How far is that from the office of the Philadelphia Warehouse Company?

A. About a square.

Q. That is, the Philadelphia Warehouse Company's office is at the northeast corner of Third and Chestnut Streets, in Philadelphia?

A. That is true.

Q. And at that place you haven't got any warehouse building?

A. We have not.

Q. It is just an office?

A. It is.

Q. You have not any warehouse building anywhere else, have you?

A. Yes.

Q. Where?

A. In this respect: We have warehouses situated all over the State of Pennsylvania at plants.

Q. You haven't got any warehouse building anywhere in the City of Philadelphia?

A. We have not.

Q. These other people who have warehouses, you get warehouse receipts from that warehouse in the same way that you got a warehouse receipt from the Yorke Storage & Warehouse Company, is that right?

A. Perhaps I do not make myself clear to you.

Q. If you do not, I will ask you. You have what you call field warehouses?

A. We have.

Q. That is, you go to John Smith, and John Smith has some goods—

A. (Interposing.) Yes.

Q. And you loan him some money?

A. We loan him our credit.

[fol. 142] Q. The result of the transaction is that he gets a check from you, is that right?

A. He gets the check that we get from the broker, yes.

Q. That is, there is not any warehouse at that place at all, is there?

A. No.

Q. That just happens to be somebody's plant where he is manufacturing some goods?

A. That is true.

Q. And then he applies to you and gets money as a result of the transaction, whatever name we give it?

A. Yes, sir.

Q. So there is no warehouse that the Philadelphia Warehouse Company has anywhere as a warehouse?

A. That is true.

Q. Now, this form, likewise, Exhibit 22, is a printed form that you used in every instance, with the name of S. B. Lewis & Company printed in?

A. That is correct.

Q. And that is another one of the forms you produce when you went in, each of these instances, to Cocarro, in his office in New York or in Surprenant's office, and arranged the terms of the deal?

A. That is true.

Q. As matter of fact, you had a complete set of these papers all printed up, did you not?

A. With respect to those two, we did.

Q. You had all these printed papers ready?

A. We did.

Q. All that Coccaro had to do was sign on the dotted line?

A. That is true.

Q. And in that way, when it came to renewals you set him a printed form, or brought him a printed form?

A. We did.

Q. And Exhibit 30 is one of those printed forms?

A. It is.

[fol. 143] Q. And on some occasions you came to New York and discussed the renewal, and on some occasions—

A. (Interposing.) I can not say that I did.

Q. Well, you think that in each instance you mailed the renewal?

A. I feel reasonably sure that no renewal was made by negotiation in New York City.

Q. Did you talk over the phone with Coccaro with regard to renewals?

A. Occasionally, yes.

Q. And then you mailed him a blank, and he signed it and mailed it back to you, is that it?

A. That is correct.

Q. That is with regard to renewals?

A. Yes, with regard to renewals.

Q. And the procedure with regard to money was as fol-

lows—and if I am not correct, you will correct me: on the principal transactions, that is, when you first made the loan, Cocarro signed the papers that you produced, that have been offered in evidence?

A. Yes.

Q. In each case?

A. Yes.

Q. And then Cocarro gave you a check on his New York bank for your charges; that is, in the case of the first note of \$16,000, you got a check from him for \$83.20?

A. That is correct.

Q. And in the case of each one of the original loans that are referred to on this sheet, Exhibit 39, the same thing happened; that is that you had deposited in the Irving Bank in New York to the account of A. J. Cocarro & Company the amount of the loan, less the discount and Lewis' charges?

A. That is not so in all transactions.

Q. Well, what did you do?

A. In one case Mr. McAndrew, of A. J. Cocarro & Company, personally received the proceeds for Mr. Cocarro. [fol. 144] Q. But in the other five instances you always had the Philadelphia Warehouse Company remit the funds to the Irving National Bank?

A. I do not believe that is so. I believe in one instance the proceeds were mailed direct to Cocarro.

Q. Then, so far as the other four transactions are concerned, it is correct?

A. I would say it is.

Q. When you originally made the deal with Cocarro, that was the arrangement that you made with him, that you were to deposit the moneys to his credit in his account in the Irving National Bank in New York?

A. Yes, at his request.

Q. That is why you did it?

A. Yes.

Q. And you did that in every instance on original loans, except two?

A. As far as I can recall.

Q. Well, this sheet, Plaintiff's Exhibit No. 39, shows the amount of the deposit in the Irving Trust Company to Cocarro's account, in every instance except one, so that

would refresh your recollection that that was what you and Cocarro agreed on, and what you did?

A. I am not so sure about that, Mr. Frank. Mr. Cocarro may have received the proceeds by mail, and have deposited them in the Irving National Bank.

Q. When you make that answer are you in doubt as to all the transactions?

A. No, not as to all the transactions.

Q. Well, as to four of them you are certain that that is what the agreement was, and that that is what the business was?

A. I think that is correct.

Q. The only doubt you have is as to the other two?

A. Yes.

Q. Now, when it came to renewals you had a different procedure, did you not?

A. Only in this respect: there was no different procedure with reference to the notes and the discounting of the notes; [fol. 145] that was done in identically the same form as with the original advance.

Q. Identically in the same form?

A. That is to say, we issued our paper in the amount required, new paper for the time required.

Q. And gave it to Lewis?

A. Delivered it to Lewis.

Q. Delivered it to Lewis in every instance?

A. Excepting the one case when the Centennial National Bank took the paper.

Q. In that case you discounted it yourselves with the Centennial National Bank?

A. Exactly.

Q. In every other instance you drew these renewal notes and gave them to Lewis, and then Lewis turned the check back to you; is that correct?

A. That is correct.

Q. And then what did you get from Cocarro?

A. We got from Cocarro a check covering our commission for the use of these renewal notes, and the amount of the discount that had been deducted therefrom by Lewis.

Q. Now, referring to this transaction that you were asked about by Mr. Podell, that is, the loan of \$5,900 on November 18, 1919, on the renewal of that loan, which was on Janu-

ary 20, 1920, the Philadelphia Warehouse Company did not give any money to Coccaro at all?

A. No.

Q. But Coccaro did give to the Philadelphia Warehouse Company his check for \$101.49?

A. For an extension of his obligation.

Q. I know; we will discuss the purpose later. I just want the figures. That is what the Philadelphia Warehouse Company got, \$101.49?

A. Yes, that is right.

Q. And when that note was subsequently renewed on [fol. 146] March 23, then you gave no more money to Coccaro?

A. That is correct.

Q. And the Philadelphia Warehouse Company got a check for \$90.60?

A. That is correct.

Q. And that was the procedure that was adopted in every one of these series of loans which is referred to in this case; that is, on the renewals the Philadelphia Warehouse Company always got a check from Coccaro for an amount which the paper stated was a certain percentage for its services, and a certain percentage of the amount for the discount, and a certain percentage was also for Lewis' services; is that right?

A. That is correct.

Q. Now, on direct examination there was a point that was not quite clear, which I wish you would clear up for me. When Coccaro first got money from the Philadelphia Warehouse Company on this \$5,900 loan, the amount deposited in the Irving National Bank to his account, as the statement shows, was \$5,636.83. You can verify that, if you will (handing paper to witness).

Mr. Frank: Correct that figure to \$5,834.

Q. (Continuing:) Now, when a renewal note was made on or about January 20, the renewal note was for the amount of \$5,900?

A. Yes.

Q. Is that right?

A. That is correct.

Q. And this amount of \$5,834 that Coccaro had received was not the amount of the renewal note?

A. No, it was not.

Q. And then when you on that date got a check from Coccaro of \$101.49—that is, I say “you;” I mean the Philadelphia Warehouse Company—that check was not used to [fol. 147] pay that old discount; that was retained by the Philadelphia Warehouse Company to pay whatever it saw fit to pay on the new note?

A. Exactly.

Q. And that was the system that was followed through all these transactions?

A. It was.

Q. And in every instance the checks that you got were Coccaro's checks, drawn on his New York bank?

A. As far as I can recall, yes.

Q. Now, these papers bear date Philadelphia—referring to Exhibit No. 21—Philadelphia, November 18. As matter of fact, though, it was signed in New York, although it is headed “Philadelphia?”

A. That agreement was signed in New York, yes.

Q. And the authorization printed on Exhibit No. 22 to Lewis bears date Philadelphia, November 18, and it was likewise signed in New York?

A. That is correct.

Q. And that was the fact with all the other papers which have been offered in evidence here, and which are endorsed on the back “Pledge Contract?”

A. That is correct.

Q. And it is the same with all the other authorizations and all the other renewals?

A. That is correct.

Q. The paper, Plaintiff's Exhibit No. 22, says: “It is understood that the rate at which this sale is to be made is not to exceed $5\frac{3}{4}$ per cent per annum and customary brokerage.” Now, that customary brokerage was the brokerage of S. B. Lewis & Company?

A. That is correct.

Q. And what was that customary rate?

A. $\frac{1}{8}$ of 1 per cent flat on 60 day paper; $\frac{1}{4}$ of 1 per cent flat on 90 or 120 day paper.

Mr. Podell: Per annum?

[fol. 148] The Court: Flat?

The Witness: Yes, flat.

The Court: Not per annum?

The Witness: For the period.

Q. That is, on the renewal the same charge was made?

A. Yes, sir.

Q. Did you say $\frac{1}{8}$ of 1 per cent flat?

A. $\frac{1}{8}$ of 1 per cent flat on 60 day paper.

Q. So if it was renewed six times during a year, it would be three-quarters of one per cent per annum?

A. Yes.

Q. And the others would be proportionately—

A. Yes.

accounts that we have in evidence here?

A. They did.

Q. And was the discount rate which is reflected in the

Q. And those are the charges which figure in these various figures on that paper uniform in all of these transactions and renewals?

A. It was not.

Q. Are you able to tell the jury what that discount or renewal rate was?

A. I think I can.

Q. Well would you mind telling us?

A. It was the rate applicable in the market at that time.

Mr. Frank: I object to that.

Q. I want to know in figures please. I do not want you to characterize it. How much was it in figures?

The Court: What was the range?

The Witness: I would say from probably five and a half to seven per cent. per annum.

Q. Were there some cases where it was in excess of seven per cent.?

A. Not to my knowledge.

The Court: That is, exclusive of commission?

[fol. 149] Mr. Frank: Exclusive of Lewis' commission.

The Witness: Yes.

Q. And exclusive of your own commission, which you charged how much for? One-quarter of one per cent. per month?

A. We charged one-quarter of one per cent. per month; three per cent. per annum.

Q. That is on these loans which were practically all sixty-day paper, you were charging one-half per cent. for the two months?

A. That is correct.

Q. What you call "flat" with Lewis—was that half of one per cent. flat?

A. That is right.

Q. Sometimes there were payments made on these notes before they were due, were there not?

A. There were.

Q. I will just call your attention to Exhibit 40. The first transaction was on November 8th, a loan of \$16,000, was it?

A. It was.

Q. And that was renewed so that on March 9th it was extended to May 7th, is that right?

A. I have nothing in this that will guide me.

Q. Will you take that, please (handing paper to witness); will you look at your blotter, please? I think you will find that more convenient?

A. Yes.

Q. One of my associates suggests that there is one of these items on which the discount rate is shown in your blotter at $7\frac{1}{2}$ per cent. Would you mind finding that, please? I think it is one of the latter accounts?

A. I see $7\frac{1}{4}$ per cent.

Q. $7\frac{1}{4}$ per cent.; which was that; on which transaction or renewal?

A. That was a renewal of \$9,000 of the balance of the \$16,000 loan made on November 8, 1919.

[fol. 150] Q. That is the first loan, the one we are talking about now?

A. Yes.

Q. Your Exhibit 40 shows that this loan was made on May 7, 1920, is that right?

A. This extension was made.

Q. I mean the extension, yes.

Mr. Frank: Let me have the extension note for \$9,000, dated May 7, 1920.

Q. (Continuing:) Now, your Exhibit 40 shows that on May 7th the loan which had originally been \$16,000 had been

reduced to \$9,000, and on that date was extended from May 7, 1920, to June 8, 1920, is that right?

A. That is correct.

Q. Did you have charge of that transaction?

A. I do not recall.

Q. Your Exhibit 40 shows an extension of \$9,000 from May 7th to June 8, 1920, does it not?

A. Yes.

Q. Now, for your convenience, instead of having one note of \$9,000, you had three notes—one of \$4,000, one of \$2,500, and the other of \$2,500, making \$9,000?

A. Not for our convenience, sir.

Q. Well, for the convenience of whoever loaned the money on these notes, or whoever discounted them?

A. For whoever ultimately purchased them.

Q. It was for some one's convenience; that is the reason one note was split into three?

A. It is not a matter of convenience; it is a matter of practice. Country banks buy them—

Q. (Interposing.) The point is that there were three notes for the renewal instead of one?

A. Exactly.

Q. And at that date you had arrived at the sum of \$9,000 by deducting all the payments that had been made [fol. 151] to the Philadelphia Warehouse Company by Coccareo to that date?

A. On that particular transaction.

Q. And will you look at these three notes; they bear date May 7th. Were they negotiated May 7th (handing papers to witness)?

A. They were.

Q. And will you look, please, at the printed form with reference thereto, from S. B. Lewis & Co. giving a report of the sale. Does that show that they were discounted on May 7th?

A. It does.

Q. Will you please explain to the jury why you credited Coccareo & Co. on a note—on a renewal of May 7th with a payment that was not made until May 20th? Look at your bill of particulars (handing paper to witness).

A. Excuse me just a moment until I look at the record here.

Q. Yes, go right ahead.

A. May I ask to have the question read, please?

(Question read.)

The Witness: Are you speaking of this particular transaction?

Q. Will you take Plaintiff's Exhibit No. 20, the original. Have you got it in your hand?

Mr. Podell: Was that question withdrawn?

Mr. Frank: Yes.

Q. I call your attention to this notation appearing upon Exhibit 40, which says, Referring to the note of \$16,000, it was renewed on March 9th in the sum of \$15,200, a payment of \$800 having been made on March 9th. Is that right?

A. That is right.

Q. And then it was renewed on May 7th in the sum of [fol. 152] \$9,000, a credit of \$6,200 having been made in the meantime, is that right?

A. That is correct.

Q. Now, those two payments that are supposed to have been made in the meantime were actually made, one on the 11th and one on May 20th, is that right?

A. That is right.

Q. So at the time the note was renewed in the sum of \$9,000 on May 7th, this payment had not been made?

A. That is correct.

Q. In other words, one payment of \$1,700 with which Coccoaro was credited on a note dated May 7, 1920, was not made until eleven days later, was it?

A. That is correct.

Q. Now, you know as matter of fact—by referring to the other exhibit, the other statement, you recall that on May 19th Coccoaro deposited \$1,795 in the Chase National Bank in the City of New York, is that right?

A. That is right.

Q. And that is the same amount that you credited to Coccoaro on a note which you say you made on May 7th on a pledge contract, which you say he signed on May 7th, and which you say you negotiated on May 7th, is that right?

A. Yes.

Q. You say that on May 7th Coccoaro signed a renewal for the loan of \$16,000 which you put in the sum of \$9,000, is that right; the renewal was for \$9,000, although the original loan had been for \$16,000?

A. Yes.

Q. And on May 7th you credited him on that renewal with \$6,200, is that right?

A. Not on May 7th, no.

Q. When did you credit him?

A. If you will let me explain that——

Q. (Interposing:) Can you not answer the question? When did you credit him?

A. We credited him May 11th with \$4,500, and May 20th, [fol. 153] with \$1,700.

Q. So that when you made the renewal note out for \$9,000 and deducted \$6,200, you had not as yet received that \$6,200?

A. We had not.

Q. And you did not get \$1,700 of that until eleven days thereafter, and you did not get \$4,500 for four days thereafter?

A. We had not.

Q. And notwithstanding that, you had Coccaro sign a renewal note in the sum of \$9,000?

A. We did.

Q. How frequently did you do that?

A. We did not do that frequently at all.

Q. Well, you did it on other occasions, did you not?

A. Not to my knowledge.

Q. Have you examined the bill of particulars?

A. Not recently.

Q. Was this drawn up by you, this Exhibit 40, or under your supervision?

A. It was.

Q. Now, on some occasions you collected money from Coccaro on some of these notes, either originals or extensions, before the note was due, did you not?

A. We did.

Q. On one occasion you collected \$400 and then \$8,000—\$7,600?

A. We did.

Q. Making a total of \$8,000?

A. Yes.

Q. Will you refer to the books with respect to that. On November 20th there was deposited to the account of the Philadelphia Warehouse Company Coccaro in the Chase National Bank in New York City the sum of \$400, is that right?

A. Can you tell me the account on which that was credited?

Q. That is the note of November 12, 1919?

A. We did receive \$1,200.

[fol. 154] Q. Yes. You received that on November 21st?

A. We did.

Q. On December 19th you received \$7,600?

A. We did.

Q. When was that note due?

A. January 12, 1920.

Q. Did you remit or return to Coccaro any credit of the sum of \$8,000 for the interest that had been paid between November 21st and January 12th?

A. We did not.

Q. Or between December 31st and January 12th?

A. We did not.

Q. Did you ever on any payment that Coccaro made before notes became due, remit him any proportionate part of the interest or of the charges that had been made?

A. We did not, to my best knowledge.

Q. On May 4th you had Coccaro deposit to your account in the Chase National Bank in New York the sum of \$8,000. That is on Account E. The \$36,000 transaction originally made on December 31st?

A. We did.

Q. Did you remit any part of the interest on that, or the charges?

A. Because it was due—

Q. During this period you had an account—that is, the Philadelphia Warehouse Company had an account in the Chase National Bank in New York City?

A. We did.

Q. And all the payments which appear on Plaintiff's Exhibit 39 as being deposited in the Chase National Bank, were deposited in the Chase National Bank of the City of New York to the credit of the Philadelphia Warehouse Company by Coccaro, is that correct?

A. Not always. Sometimes they were sent direct by us, I believe.

Q. But I have called your attention to the statement [fol. 155] which we got up at lunch time to-day, in which we put down the names of the various banks where the deposits were made, and in some cases you put down the

name of the Girard National Bank, and in some cases the First National Bank, and in some the Bank of North America?

A. That is true.

Q. And some the Chase National Bank?

A. Referring to our deposits possibly, and possibly to Coccaro's deposits for our account, sometimes he making it and sometimes we making it after having received it from him.

Q. Is it not a fact that in each instance where it appears on this Exhibit 39, that the words "Chase National Bank" are written, that Coccaro deposited the sum indicated in the Chase National Bank in the City of New York?

A. I cannot tell from this record.

Q. Well, can you tell from any other record?

A. I can tell from the stubs of the Chase bank book.

Q. Would you mind looking at that and seeing if that is not exactly what we discovered at lunch time?

A. Do I understand your question to be on all these payments?

Q. No; I am just interested in starting from the end. You will see the payments there, which apparently were credited to your account by the Chase National Bank on those dates. See if that is not correct.

Mr. Podell: Will you specify the dates?

Mr. Frank: They are on the statement.

Mr. Podell: The dates as they appear on the statement, Exhibit 39?

Mr. Frank: Yes.

[fol. 156] The Witness: With respect to that \$3,700, Coccaro appears to have deposited that for our account in the Chase National Bank.

Q. Give the date, please?

A. That is May 20th; also with respect to the \$1,795.05.

Q. How about the \$4,500 on May 11th?

A. Also the \$4,500 in May 11th.

Q. And \$500 on May 5th?

A. Also the \$500 on May 5th.

Q. And the \$800 on May 4th?

A. Yes, equally true.

Q. And the \$700 on March 24th?

A. I do not believe that we received that from Mr. Coc-

caro by deposit of his to our credit. I think he sent that directly to us.

Q. How about the deposit of \$124.42 on March 23rd?

A. I believe he sent that directly to us.

Q. Then, is that paper that we prepared at lunch time in error in indicating the last two items were deposited by him in the Chase National Bank?

A. This paper is not supposed to indicate that he or we deposited; merely that the deposit was made in the Chase Bank.

Q. Well, the amount corresponds to the amount you credited Coccoaro with, does it not?

A. It does.

Q. So, so far as we know, it was the same account?

A. Yes.

Q. And you credited him with that amount in your books?

A. We did.

Q. And in this instance where he was credited on your books on November 21st with \$400 he deposited that in the Chase National Bank in New York City to your account, and the other item of \$7,600?

A. I do not think we received the \$400 by his crediting [fol. 157] our account, but rather by his forwarding us a check which we deposited in the Chase National Bank.

Q. How about the \$7,600, December 19th—\$7,600?

A. We did receive that by his having deposited that to our credit.

Q. Now, before you had these series of transactions which started in November on November 8th, with \$16,000—a \$16,000 note and the renewals, you had done other business with Coccoaro, had you not?

A. We had.

Q. And when had you started that?

A. January, 1918.

Q. And about how many of those transactions did you have?

A. Just one, so far as an advance was concerned.

Q. What other transactions did you have?

A. There were extensions of that advance.

Q. And what was the amount of that?

A. \$12,750, as I recall it.

Q. And when was that finally disposed of, or put out of the way?

—. If my memory serves me correctly, in January, 1920.

Q. When you started this new series of transactions on November 8th with Coccoaro, did you go directly to him and solicit further business?

A. We did not.

Q. Were you seeing him occasionally for the purpose of extending the old notes?

A. I did not.

Q. Well, were you in New York about that time attending to the business of the Philadelphia Warehouse Company generally?

A. When I was required to, yes.

Q. Well, you had a good deal of other business right around that time in November, 1919?

A. I would say that we had.

[fol. 158] Q. And did you see Coccoaro personally about that time?

A. Only when required in connection with advances.

Q. Well, did he ever speak to you personally about loaning him any more money after this \$12,000 transaction?

A. Not to my knowledge.

Q. Well, these other transactions took place all together, did they not—November 8th, November 12th, two on November 8th, one November 21st, and one on December 19th, is that right?

A. That is correct.

Q. Then, you started this new line of business, did you, before any talk with Coccoaro about new business with him?

A. Just one conversation, as I recall it.

Q. And where was that? Can you recall that? In Mr. Coccoaro's office?

A. In the office of A. U. Surprenant & Co.

Q. Had you ever done business with Mr. Surprenant before?

A. We had accepted clients of his who desired advances.

Q. How frequently had you done business with Surprenant & Co.? Was it very frequently?

A. Not in proportion to the whole of our business, no.

Q. Well, was it as much as once a month that you did business with Surprenant?

A. I would say it was.

Q. And that was with reference to other firms than Coccoaro?

A. It was.

Q. So at least once a month you were in Surprenant's office?

A. There was no periodical time, you understand.

Q. I know, but it was quite frequently you went to Surprenant's office?

A. I would not say it was, after the original transaction was made.

[fol. 159] Q. I am not talking about Coccoaro's business; I mean generally?

A. I am speaking generally.

Q. The various businesses you had brought to Surprenant's office frequently?

A. Only in connection with an advance, and I would not say that was frequently.

Q. You knew Surprenant was a loan broker?

A. I did.

Q. You knew that was his business?

A. I did.

Q. When you first spoke to Coccoaro about this series of transaction-, was there anybody there besides you and Coccoaro?

A. Yes, I suppose Surprenant was there.

Q. Who?

A. Mr. Surprenant.

Q. In Coccoaro's office?

A. Oh, I beg your pardon. In Coccoaro's office?

Q. Yes,

A. I do not recall anybody being present at the time we actually spoke of our transactions in Coccoaro's office.

Q. Was anybody there when Coccoaro signed these various papers?

A. Occasionally Mr. McAndrew, and also Mr. Christie would come into the office, but they had nothing to do with the transaction.

Q. Is Mr. McAndrew this same gentleman that you say went over and got the check from you once in Philadelphia?

A. The same gentleman.

Q. Did you ever talk to Mr. McAndrew about the terms on which you would do business with Coccoaro?

A. I did not.

Q. At no time?

A. At no time.

Q. Did you talk to Mr. McAndrew when he came to Philadelphia to get this check?

A. I did not.

Q. Did you deliver him the check?

A. Not to my knowledge.

[fol. 160] Q. Did you take the receipt?

A. Not to my knowledge.

Q. Did you at any time say to Mr. Coccaro that you would not give him this loan unless it were done through Surprenant?

A. We did not.

Q. Did you say anything to Mr. Coccaro about Surprenant & Co.?

A. What is that?

Q. Did you at any time say anything to Coccaro about what part, if any, Surprenant was to play in the transaction?

A. We did not.

Q. Did you know what Surprenant was getting as commission?

A. I did not.

Q. Did you ever inquire of Surprenant whether he was getting a commission?

A. I did not.

Q. Did you ever get any part of any commission that was given to Surprenant?

A. I did not.

Q. Were you ever in Surprenant's office when he called up Mr. Christie or Mr. McAndrew and asked them why they did not bring over the check for his commission?

A. Not to my knowledge.

Q. Well, you would have knowledge of it, if such a thing happened, would you not?

A. I presume I would, and I do not recall it.

Q. You would not say that that did not happen, would you?

A. I believe I could say so.

Q. Did you ever receive any commission from Surprenant out of his commission, or otherwise, with respect to this Coccaro business?

A. We did not.

Q. Did you ever say to Mr. Coccaro that the only terms on which you would do business with him was in case he negotiated the loan through Surprenant and paid him a commission?

A. We did not.

Q. Did you ever receive any part of Surprenant's commission?

A. We did not.

[fol. 161] Q. Personally?

A. Personally nor otherwise.

Q. Did you ever turn it over to the Philadelphia Warehouse Company?

A. I never received any to turn over.

Q. Did the Philadelphia Warehouse Company ever receive any commissions or parts of commissions from Surprenant?

A. They did not.

Q. Did the other pay any to Surprenant?

A. Not in connection with Coccaro's loans.

Q. Or any other loans at all?

A. Five years before, prior to that time.

Q. Have you got the book of account that you had here this morning?

A. Yes.

Q. Will you turn to page 383, please?

(Informal Recess.)

Mr. Podell: Your Honor, I have a couple of witnesses from Philadelphia. They will be very short. They have been here a couple of days.

Mr. Frank: If all you want to do is to submit some papers——

Mr. Podell (interposing): That is all.

Mr. Frank: If you will give me the papers, probably I will admit them.

Mr. Podell: Well, I had rather call them and prove them.

Mr. Frank: Very well.

EDGAR S. KROMER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Kromer, I show you a draft drawn on the Bank of North America, and ask you whether that bears the [fol. 162] signature of the cashier, and was issued on the date that it appears to be dated (handing paper to witness)?

A. Yes, only this draft is drawn on the National City Bank, by the Bank of North America.

Q. Yes, drawn by the Bank of North America on the National City Bank of New York?

A. That is right.

Q. Have you got any other drafts or checks?

A. No, that is the only one. We were cited to bring two, but the other draft was the First National Bank of Philadelphia.

Q. And not yours?

A. Not ours.

Mr. Podell: That is all. I offer this in evidence.

Cross-examination.

By Mr. Frank:

Q. At all times the Philadelphia Warehouse Company had quite a large account in your bank, did they not?

A. Yes, sir.

Q. For some time past?

A. For many years.

Mr. Frank: That is all.

Redirect examination.

By Mr. Podell:

Q. What is this slip of paper (exhibiting)?

A. Just a memorandum.

Q. What is your office with that bank? What bank are you connected with?

A. The Bank of North America.

Q. In what capacity?

A. Cashier.

Q. And you were so connected in November 1919?

A. Yes.

Mr. Frank: We do not dispute the authenticity of the check.

[fol. 163] Mr. Podell: All right.

(Witness excused.)

(Paper marked Plaintiff's Exhibit No. 42.)

WILLIAM P. COSGROVE resumed the stand.

Cross-examination continued.

By Mr. Frank:

Q. Can you refresh your recollection by looking at page 83 of the record about the Philadelphia Warehouse Company splitting a commission on a loan with A. U. Surprenant & Co.?

A. I do, in the case of De Lion Tire & Rubber Co.

Q. And when was that?

A. In November, 1919.

Q. And that was not five years ago?

A. No; I was in error.

Mr. Podell: I move to strike out any evidence relating to that as having no bearing at all upon the transaction in suit. It is an entirely independent transaction, and we will have to try another case here.

The Court: I think it has a bearing on the relations of these parties.

Mr. Podell: I will take my exception.

Q. Now, after looking at that item in November, 1919, do you recall any other case where the Philadelphia Warehouse Company about that period split commissions with A. U. Surprenant & Co. or A. U. Surprenant?

A. I do not.

Q. Did you keep any separate book or record of cases where commissions were split with a broker?

A. None excepting what appears in the ledger under his name.

Q. Have you got the ledger account with A. U. Surprenant & Co.?

A. Probably.

[fol. 164] Q. Will you see whether that item of the split commission appears in the ledger account?

Mr. Podell: Are you talking now about the De Lion Tire & Rubber Company?

Mr. Frank: Yes.

The Witness: It does appear in the ledger.

Q. May I see it, please?

A. Yes (handing book to Mr. Frank).

Q. Did you split your commission on the renewals of that account, with Surprenant likewise?

Mr. Podell: Which account?

Mr. Frank: The De Lion Tire & Rubber Company.

The Witness: As far as I recall, we did.

Q. I see. Was that a New York concern, the De Lion Tire & Rubber Company?

A. It was not.

Q. What is that?

A. It was not.

Q. Did you handle that transaction?

A. I did.

Q. And, according to this account, you made a payment in February, 1920, on account of splitting commissions with

A. U. Surprenant?

A. If that appears in the record, we did.

Q. Well, just see if it does not appear.

A. That is correct.

Q. I see. Now, on this paper, Plaintiff's Exhibit No. 21—that is, this pledge contract—there is a statement that Coccaro was to pay all charges for storage, insurance and other necessary expenses. He did pay all those charges, did he not?

A. As far as I recall, yes.

Q. That is, he paid you separately for such things as telephones and telegrams and car fares and notaries' fees, [fol. 165] storage in the warehouse of goods?

A. He would, yes.

Q. That is, in these charges that you made, and which appear upon this statement, Plaintiff's Exhibit No. 39, those charges are net, and do not include in any case any other charges, such as storage, insurance, stamps and other things?

A. They do not, outside of revenue stamps on the notes.

Q. Where the statement says, "Revenue Stamps, \$3.20," those were paid?

A. Yes.

Q. And in every instance Coccoaro paid all the storage expenses; is that correct?

A. I believe he did.

Q. That is, up to the time he failed?

A. Yes.

Q. And all the insurance?

A. Yes.

Q. And all other incidental expenses?

A. Yes, sir.

Q. Now, in this particular note or in this particular paper, where you got a bill of lading from Mr. Coccoaro, the goods subsequently, you say, were put in the Yorke Storage and Warehouse Company's warehouse?

A. They were.

Q. You knew at that time that Mr. Coccoaro was the owner of that, did you?

A. I did not.

Q. When did you first find out?

A. At the time of his bankruptcy.

Mr. Podell: You mean the Yorke Storage and Warehouse—the owner of that, you mean?

Mr. Frank: Yes, the Yorke Storage and Warehouse.

Q. And what you did after you got this negotiable warehouse receipt was to just keep that in your files in Philadelphia; is that it?

A. We did.

[fol. 166] Q. And with regard to each of the transactions that appear in this case, these five or six papers represented by these so-called pledge contracts, that is what you did with all of the papers in each instance; that is, you kept them there?

A. Yes, we did.

Q. And you did not do any additional work with respect to them, and you did not render any services with regard to taking care of the merchandise?

A. No, I would not say we did.

Q. That is what the warehouse was paid for?

A. Exactly.

Q. And all you did after that was to deposit those non-negotiable warehouse receipts in your portfolio in Philadelphia and keep them?

A. We did.

Q. With regard to the care or custody of the merchandise, I mean. In this transaction there is a statement of \$30.41 paid as commission for its responsibility and services as above, in advance of its credit?

A. Yes.

Q. Would you say that was for the advance of your credit?

A. It was in this particular instance.

Q. There were no other services with regard to taking care of the merchandise?

A. There were not in any of Coccoaro's cases.

Q. As matter of fact, when you first talked to Coccoaro, he told you he wanted to get some money, that he needed money, did he not?

A. Beg pardon?

Q. When you first spoke to Coccoaro, he wanted to borrow money, did he not?

A. As far as I can recall, yes.

Q. And he applied to you for a loan of money, did he not?

A. He did.

[fol. 167] Q. And then you told him that you would loan him the money, did you not?

A. I did not.

Q. You told him you had a way by which you could get the money?

A. I did not.

Q. What did you say?

A. I explained to Mr. Coccoaro, as I said before in my testimony, that we would, if he gave us proper security, issue our paper for his account.

Q. You said that to him?

A. I said that to him.

Q. You did not say at any time that you would get him the money or would loan him the money?

A. I did not, not to my knowledge.

Q. This collateral that you took you kept all the time?

A. We kept the evidences of the collateral.

Q. You kept these non-negotiable warehouse receipts?

A. We did.

Q. You never turned them over to any other people together with the note, did you?

A. We did not.

Q. Do you want to tell the jury that what Coccaro understood at that time was a loan of credit and not a loan of money?

A. If he understood my words, he understood it was a loan of credit.

Q. Is this something in the nature of a set form that you recited to everybody that asked you—

A. (Interposing.) There was a set form as we use now.

Q. There is, you just recited that to Coccaro? There was a set form of words which you used?

A. Yes.

Q. That is, Coccaro said, "I want to borrow some money." is that right?

A. Coccaro said that?

Q. Is that what he told you?

A. He probably did.

Q. And he said he had collateral and that you could be secured for it?

A. Yes.

[fol. 168] Q. And then you recited the same form that you have told the jury on your direct examination, about how you could give him a loan of credit by using your notes in Philadelphia and so forth?

A. There was no set form, but there was set essence of form, if you understand what I mean.

Q. And then after you repeated that, Coccaro signed these printed papers you had with you there?

A. He did.

Q. And you took them away with you?

A. I did.

Q. Did you ever give Coccaro a copy of any of those printed papers?

A. Not to my knowledge. He could have had them, if he desired them.

Mr. Frank: I move that that be stricken out.

The Court: Yes.

Q. You never did give it to him?

A. Not to my knowledge.

Q. During the month of May did you ever release any of this collateral?

A. I would have to refresh my memory from the records. I believe we did.

Q. Would you mind doing that, please, and let me know?

A. We did make releases of collateral in May, 1920.

Q. And on the statement, Plaintiff's Exhibit No. 40, you distributed payments of about \$20,000 that you got in May and assigned them to various accounts. Who made that distribution?

A. We did.

Q. That is, if you got a check from Coccoaro for \$1,700, then you would apply a thousand of it on note A, and another on note C, for instance?

A. May I explain that.

Q. Yes, surely. Go ahead.

A. May I explain?

[fol. 169] Q. Yes, please.

A. As a condition to a renewal of some of the loans, we stipulated that he must make a payment on account to reduce the amount outstanding.

Q. My question is directed simply to cases where you get money in the month of May, where no note was due. There were several cases like that, were there not? Will you look at Exhibit 39 and 40?

The Court: May 7th, May 11th, and May 20th.

The Witness: There were certain payments in 1920 prior to the maturity of notes.

Q. I am asking you about May, where no notes were due, but Coccoaro paid you considerable amounts of money.

A. I believe that is true.

Q. What system or method did you follow as to whether you credited that payment on the first, second or any other note of the series?

A. If the payment was made for collateral, it was applied on account of the note from which collateral was removed.

Q. There was only one payment in the month of May where it was made on account of collateral, was there not—a payment?

A. I do not recall.

Q. Well, just look at your records.

Mr. Podell: I object to the question on the ground that it is well settled that a creditor has a right to make his applications in any manner he sees fit.

[fol. 170] The Court: Overruled.

Mr. Podell: Exception.

Mr. Frank: May I withdraw that question for a moment? I may lead up to it later.

Q. Mr. Samut testified here that he was accustomed to send bills for storage of this "Blue Boy" salmon to the Philadelphia Warehouse Company. Did you know about that?

A. Yes.

Q. And did you know that after the month of January, 1920, you did not get any more bills for "Blue Boy" salmon?

A. Yes.

Q. Did you investigate then—go to the warehouse to see what had happened to the "Blue Boy" salmon, because you did not get any bills for the storage?

A. No, because what was true of the "Blue Boy" was true of all other goods.

Q. What was that?

A. What was true of the Salmon account was true of all other accounts; namely, that we had agreed with the Yorke Storage Company—

Q. (Interposing.) Have you got that agreement here?

A. I believe it is in our letter book—that Mr. Coccaro might pay the charges due on any merchandise stored in our name in the Yorke warehouse.

Q. Do you recall when that was, about what month or what year?

A. I do not recall the exact date.

Q. Now, on May 20th you got a payment for \$3,700, did you, which was deposited to the Philadelphia Warehouse Company's account in the Chase National Bank? You can look at any of these books or papers that you want.

A. If my memory serves me, I think that is correct.

[fol. 171] Q. Now, there was not any note due on May 20th, was there?

A. Not to my knowledge.

Q. And you credited that to the second note, the note of \$19,300, is that right.

A. Just a moment, please.

Q. Yes.

Mr. Podell: That is all subject to the same objection and exception, with your Honor's permission.

The Court: Yes.

The Witness: May I ask the amount of that?

Q. Yes. \$3,700 deposited in the Chase National Bank of New York on May 20th?

A. On account of which particular advance?

Q. Your bill of particulars shows it was credited on account of the \$19,300 advance, dated November 12th, which in your bill of particulars is marked B?

A. That is right.

Q. Was there any conversation or letter between Coccaro and yourselves directing you to credit that to account B and not any other account?

A. No, we released collateral for that payment.

Q. What collateral did you release?

A. 640 cases of tall pink salmon, Diana Brand.

Q. On the same date you got a check for \$1,700, which was deposited in the Chase National Bank, which you credited to account A. Did you release any collateral for that?

A. Account A being what?

Q. The first one \$16,000.

A. I do not believe we did.

Q. On May 11th there were deposited by Coccaro in the Chase National Bank to your account \$4,500. Did you release any collateral for that?

A. We did.

[fol. 172] Q. What collateral did you release for that?

A. 275 cases Del Monte bartlett pears, 250 cases Easter Extra Standard bartlett pears.

Q. On May 4th you got \$8,000 from the Chase National Bank. Did you release any collateral for that payment?

A. May I ask which account?

Q. Yes, that is on account E, the \$36,000 transaction.

A. We did.

Q. What did you release there?

A. 1,200 cases of choice evaporated apples.

Q. Whom did you send these releases to? Mr. Coccaro or Mr. Surprenant?

A. To the Yorke Warehouse, I believe, direct; never to Surprenant.

Q. I show you a letter bearing the receipt date of January 8, 1920. Did you receive that from Mr. Coccaro (handing paper to witness)?

A. I believe we did.

Q. Did you receive the check of \$271 indicated in there at the same time?

A. \$271?

Q. Well, it says there—whatever the amount is?

A. I believe we did.

Mr. Frank: Yes. I offer that letter in evidence.

Mr. Podell: May I see it?

Mr. Frank: Yes, surely (handing paper to Mr. Podell).

Mr. Podell: No objection.

(Paper marked Defendants' Exhibit A.)

Mr. Frank: I will read this to you in a moment, gentlemen.

Q. Now, Mr. Cosgrove, these notes that you had, which have been offered in evidence, they were all printed on a certain form, payable, some of them, at the Chase National [fol. 173] Bank in New York, some at the Girard Bank in Philadelphia?

A. That is right.

Q. They were likewise printed forms?

A. They were.

Q. Now, those notes were not made or filled out at the time you made your deal with Coccaro in New York, were they?

A. They were not.

Q. And the first time the notes came into being was when you went back to Philadelphia, and then you filled them out and gave them to S. B. Lewis & Co.?

A. That is true.

Q. Do you know that Coccaro was indicted in the County of New York?

A. I do.

Q. And you appeared as a witness before the Grand Jury in that case, did you?

A. I did.

Mr. Podell: Against Coccaro?

Q. Against Coccaro?

A. Yes.

Q. And you were the only witness representing the Philadelphia Warehouse Company who appeared before the Grand Jury, were you?

A. I was.

Q. And you testified there?

A. I did.

Q. It was on your complaint that he was indicted, was it not?

A. Not alone.

Q. Well, you read the indictment in this case, did you not, against Coccaro?

A. There was another man who also assisted in that.

Q. You knew what he was charged with, did you not?

A. Yes.

Q. And it was in connection with one of the transactions involved in this suit, was it not?

A. Yes.

Q. That is, in connection with the loan of November 12, 1919, covering Diana tall pink salmon and Del Monte pears, [fol. 174] and so on, was it not?

A. I do not recall.

Q. Well, would it refresh your recollection if I showed you a copy of the indictment?

A. Yes, I think it would.

Q. After looking at a copy of that indictment, does it refresh your recollection as to what you testified to?

A. Not as yet, it does not.

Q. If you will turn to the third page of it, it may. Do not look at the legal language so much, but just look at the bill attached. Would you mind just comparing that with the pledge receipt of November 12, 1919, and see if that refreshes your recollection (handing paper to witness)?

A. I recognize the data in Exhibit A here, but the rest is pure Greek to me.

Q. Did you not tell the Grand Jury in that case that on

or about November 12th and in the County of New York that A. J. Coccaro obtained from your possession five certain promissory notes totaling \$16,000?

Mr. Podell: I object to that as an apparent attempt to read from a copy of an indictment an implication that that was the testimony furnished by this witness. He is in nowise responsible for the indictment.

The Court: No, but he may ask him what he said.

The Witness: I do not recall.

Q. Did you state to the District Attorney in charge of the matter at that time that in the County of New York on or about November 12th, A. J. Coccaro had obtained from your possession five certain notes totalling \$16,000?

[fol. 175] Mr. Podell: I make the same objection as incompetent and irrelevant, and not a proper method of cross examination.

The Court: Overruled.

Mr. Podell: Exception.

A. I do not recall any reference to those five particular notes.

Q. Do you not recall going to the District Attorney and making a complaint against Coccaro?

A. I certainly do.

Q. Do you not remember testifying under oath before the Grand Jury in the County of New York?

A. I certainly do.

Q. Do you not remember attending in court when Coccaro was arraigned, and pleaded guilty?

A. I do.

Q. And at no time did you investigate to see what the charge against Coccaro was?

Mr. Podell: I object.

The Court: Sustained.

Q. Do you mean to tell the jury that you do not recall just exactly what you told the Grand Jury about Coccaro?

A. I do not.

Q. And the charge you made against him?

A. I do not.

Q. How many times in your life have you been a witness before a Grand Jury?

A. Never.

Q. Well, this time you were?

A. Well, just that time, yes.

Q. You were sworn to tell the truth?

A. I was.

Q. And you do not recall what you told the Grand Jury at that time?

A. I do not.

Mr. Frank: That is all.

[fol. 176] Redirect examination.

By Mr. Podell:

Q. Did you have anything to do with the drawing of that paper that he read from?

A. No.

Q. Were you consulted about it?

A. No.

Q. Did the assistant confer with you when he began to put that Greek in there?

A. He did not.

Mr. Frank: I object to the characterization as Greek.

Mr. Podell: He characterized it as Greek in answer to your question.

Q. When you released collateral in the manner you have indicated, at whose request did you release that specific collateral?

A. Mr. Coccaro's.

Q. Did you follow his instructions in that regard?

A. We did.

Q. When you released that salmon—640 tins, I think you said it was, that was not part of the salmon in this transaction, was it?

A. It was not.

Q. It was Diana salmon?

A. It was.

Q. Now, this plan of notes and forms, was that adopted by you for the special benefit of Coccaro?

A. It was not.

Q. Had you been doing business in just that way with hundreds if not thousands of people?

A. We had.

Q. And you had been doing that for fifty-two years?

Mr. Frank: I object to that. He had only been there twelve years.

Q. Well, had you been doing it for twelve years?

A. We had.

Mr. Frank: I object to that.

The Court: He may answer.

[fol. 177] Q. What is your answer?

A. We have.

Q. And besides Surprenant as brokers bringing customers to you, were there other brokers that brought customers to you?

A. Yes, there were.

Q. Now, counsel asked you about the services that your concern rendered in addition to getting these notes placed in the market, as you have testified to. Did you also render the service of paying all these notes?

Mr. Frank: I object to counsel testifying.

Mr. Podell: I am not testifying.

Q. Did your concern actually meet these notes when Coccoaro did not meet them?

A. It did.

Mr. Frank: That is already in evidence.

Mr. Podell: Yes, but you forget about it.

Q. Now, some discussion has been had with you about the De Lion Rubber and Tire Company. I would like you to tell us what that is. As to dividing commissions—that phrase was used, or splitting commission, what happened there? Do you remember? Did you have charge of that transaction?

A. I recall it. I did have charge of it.

Q. What happened?

A. Mr. Surprenant explained that his fee in connection with the transaction, for introducing that company to us, would be one-sixth of the commission which we were to receive, and we agreed to and did pay him that commission.

Q. You paid him commission?

A. We paid him a commission.

Q. And when counsel said "splitting commissions" you never split any commissions that Surprenant received from anybody, did you?

A. We never did.

[fol. 178] Q. Surprenant got part of yours, did he not?

A. He did.

Q. And that is the De Lion Transaction?

A. Yes.

Q. Now, a good deal has been said about your crediting Coccaro with payments before they were actually made, with specific reference to the payments that he made in May, on May 11th and May 20th. Now, in that connection have you got the original of the letter that you received from Coccaro?

A. A letter?

Q. Yes, a letter. Do you know what I refer to? Counsel emphasized that on May 7th you credited him on a renewal note with payments that were not made by him until May 11th and May 20th.

A. I recall that.

The Court: On May 7th he credited him.

Mr. Podell: Yes, on May 7th he credited him.

Q. Now, what I want to know is whether that was done pursuant to an arrangement with Coccaro?

A. It was.

Q. And is that arrangement in writing?

A. It is not.

Q. Well, have you got a letter from Coccaro, or did you write a letter to Coccaro in that connection? Have you got a copy of a letter that you wrote to Coccaro? Let me see those copies, and I will point out to you what I mean.

A. (Handing papers to Mr. Podell.)

Q. Yes, this one right here (indicating). Look at it and see if that is a copy of a letter that you wrote Coccaro in that connection (handing paper to witness)?

A. I wrote that letter.

Q. And is it with reference to this matter?

[fol. 179] Mr. Frank: Please.

Mr. Podell: All right. I will be glad to have you look at it. I offer it in evidence.

The Witness: It is in the book, by the way.

Mr. Podell: Yes, it is in the copy book (handing paper to Mr. Frank).

Mr. Frank: I would like to know if that is in answer to any letter? I would like the rest of the correspondence.

Mr. Podell: I withdraw the offer for the present.

By Mr. Podell:

Q. Look at this copy of a letter and read it through carefully. There is reference there to a telephone conversation, and just refresh your recollection and tell us the substance of your telephone conversation with Mr. Coccaro. Was there a telephone conversation?

A. There was.

Q. And was it confirmed by this original letter?

A. It was.

Q. Now, just tell us what your telephone conversation with Coccaro was with respect to that matter?

A. Mr. Coccaro desired the release of this merchandise, and to make payment therefor prior to or at the maturity of the loan in which it was deposited as collateral, and we agreed that if he would deposit the amount necessary therefor, \$6,200 in the Chase Bank to our credit, we would see that he received the merchandise.

Q. Now, has that anything to do with the credits of May 11th and May 20th?

A. It has.

Q. And those credits were made pursuant to this arrangement—this telephone arrangement?

A. They were.

[fol. 180] Q. What is the date of this confirmatory letter?

A. May 7, 1920.

Q. And the telephone conversation that you have just given must have taken place before May 7th, before the date of that letter?

A. It took place on the morning of this letter.

Q. On the date of this letter?

A. Yes.

Q. And that is why you reduced the \$16,000 note to \$9,000?

A. That is why.

Q. And released his collateral?

A. Exactly.

Q. Now, whatever else may have been done in New York

in connection with these transactions, was there ever an instance where the paper was delivered in any other place—the commercial paper—but Philadelphia, at your office?

Mr. Frank: I object to the form of the question.

The Court: Yes.

Mr. Frank: If you say, "Did you hand it over to S. B. Lewis anywhere else but Philadelphia?"—

Mr. Podell: All right.

Q. Did you at any time on any of these occasions in the original loans of credits, as well as renewals, did you ever deliver any of those promissory notes or ever hand over any of those promissory notes at any place other than the City of Philadelphia?

A. We did not.

Q. Were they executed at any place other than at the City of Philadelphia, in the State of Pennsylvania?

A. They were not.

Q. I think it is already in the record that F. B. Lewis was doing business in the City of Philadelphia?

A. It is.

[fol. 181] Mr. Podell: Now, will your Honor require me to produce evidence of what the Pennsylvania law is? I confess I am not clear.

Mr. Frank: The Court takes judicial notice of it.

The Court: Yes, the Court takes judicial notice of the law of all the States—of the statutes.

Q. Do you recall reference having been made to an arrival notice which you sent on the Yorke Storage and Warehouse Company—do you remember that?

A. I do.

Q. An arrival notice of the one thousand cases of "Blue Boy" salmon?

A. I do.

Q. I want to ask you whether that arrival notice was received by you from Coccaro, and was enclosed in the letter which I show you now, bearing date November 20th (handing paper to witness)?

A. It was.

Mr. Podell: I offer it in evidence.

Mr. Frank: No objection.

(Paper marked Plaintiff's Exhibit No. 43.)

Mr. Podell: This is on the letterhead of A. J. Coccaro & Co., and dated November 20, 1919, addressed to the Philadelphia Warehouse Company, Philadelphia, Pennsylvania (reading to the jury Plaintiff's Exhibit No. 43).

Q. Now, I show you this draft of the Bank of North America in the sum of \$19,098.96, and I ask you whether those represent the proceeds of the sale of any of this commercial paper (handing paper to witness)?

A. They do, sir.

Q. Which one, please, do you know? Look at the schedule and tell us?

A. Yes, sir.

[fol. 182] Q. Which one?

A. The advance of \$19,300, dated November 12, 1919.

Q. Now, whom did you receive this from?

A. From S. B. Lewis & Co.

Q. Were they the brokers that had sold that paper?

A. They were.

Q. And is this the identical check that you received (handing paper to witness)?

A. It is.

Q. And what did you do with that check? I mean, that identical check? It is payable to your order. Now, what did you do with it?

Mr. Frank: The check speaks for itself. It is in evidence.

Mr. Podell: I am asking him what he did with it.

The Witness: We endorsed it to the order of A. J. Coccaro & Co. and forwarded it to him by mail.

Q. The identical check?

A. The identical check.

Q. And the endorsement appearing on the back thereof is the endorsement of A. J. Coccaro & Co., or rather is the endorsement to the order of A. J. Coccaro & Co.?

A. It is.

Q. And it bears the signature of your treasurer?

A. It does.

Mr. Podell: Then the stamp endorsement appears on the back of this check to A. J. Coccaro & Co. The check is on its face a draft drawn by the Bank of North America on

the National City Bank, and it is payable to the order of the Philadelphia Warehouse Company, and by the cashier who took the witness stand a few moments ago, and it is endorsed to the order of A. J. Coccoaro & Co. by Philadelphia Warehouse Company. That is all.

Recross-examination.

By Mr. Frank:

Q. That is the only one of the checks for the original amounts credited to Coccoaro, which you have, which was handed in that way, is that right?

A. That is true.

Q. The others were all remitted directly by the Philadelphia Warehouse Company to the Irving National Bank?

A. Excepting, I believe, the one which Mr. McAndrew received the proceeds of.

Q. In other words, there were four of them which went direct to the Irving National Bank from the Philadelphia Warehouse Company?

A. I believe there were.

Q. You testified that there were certain other brokers with whom you had business?

A. Yes.

Q. Did you give any of these other brokers part of your commission?

A. We did not.

Q. Did none of them give you any?

A. They did not.

Q. Was there no tit for tat in your business?

A. We didn't play that way.

Q. You never got anything from anybody?

A. No, we gave them something.

Q. No tit for tat at all?

A. No.

Q. Toward the end of May, 1920, you knew Coccoaro was in pretty bad shape, did you not?

A. Toward the end of May, 1920?

Q. Yes, just before the bankruptcy, in the week before?

A. What do you mean by "pretty bad shape"?

Q. You knew he was hard pressed for money, did you not?

A. That was a condition always existent, as far as I know.
[fol. 184] Q. You knew he was just about to go into bankruptcy, did you not?

A. I did not.

Q. Was not that the reason why you were gathering in as much of this money as you could in the month of May?

A. No, it was not the fact.

Mr. Podell: I object to that.

Q. There was no other month during your dealings with Coccoaro that you got anything like \$20,000 from him?

The Court: He has answered that.

Mr. Frank: All right. Withdrawn.

Further redirect examination.

By Mr. Podell:

Q. And was there any other month when he withdrew as much collateral as he did in the last month?

A. There was not.

Q. I want to show you a letter and see if you can refresh your recollection as to other drafts which were forwarded—identical drafts forwarded to Coccoaro, besides this one (handing paper to witness)?

A. Yes, there appears to have been one other transaction.

Q. How much was the amount?

A. \$36,000.

Q. Now, have you refreshed your recollection sufficiently so that you can say just what course was followed with respect to the draft?

A. I would say that the proceeds of that advance of \$36,000 were mailed directly to Mr. Coccoaro.

Q. In the form that you received it?

A. In the identical form in which we received it.

Q. And what was the date of that transaction?

A. December 31, 1919.

Q. And that is included in these papers that we have offered in evidence?

A. It is.

[fol. 185] Mr. Podell: That will be all.

Mr. Frank: That is all.

(Witness excused.)

THOMAS M. CLARE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. What is your business or occupation?

A. Chief Clerk.

Q. Of what?

A. New York Central, Barclay Street Freight Station.

Q. And were you Chief Clerk in November, 1919?

A. I was.

Q. Have you got a record there of the receipt of certain salmon in that month—certain cases of salmon?

A. I have.

Q. What is the date of that record?

A. November 19th, 1919.

Q. Yes. Have you got the checking receipt?

A. Yes, sir.

Q. Was that checking done under your supervision there?

A. No, sir.

Q. Was it done there at the pier of the New York Central?

A. It was done at the pier, yes, sir.

Q. And were those records made in the regular course—

Mr. Frank (interposing): We will not question the New York Central records.

Mr. Podell: All right. Let us have them.

(Papers handed to Mr. Podell by the witness.)

Mr. Podell: I offer in evidence the records of the re-[fol. 186] ceipt to the order of the Petersburg Packing Company.

Mr. Frank: That is the arrival notice.

Mr. Podell: Yes, a copy of the arrival notice, showing 999 cases No. 1 Tall Canned Salmon, with the original tally on the other side.

(Papers marked, respectively, Plaintiff's Exhibits Nos. 44 and 45.)

Q. Is this the bill of lading that was surrendered at the time that these cases were taken out (handing paper to witness)?

A. Yes, sir.

Mr. Podell: Referring to Exhibit No. 23 in evidence. That is all. You will have to leave these, and I will return them to you after the case is over.

The Court: Ten-thirty tomorrow morning, gentlemen.

Adjourned to Friday, November 9, 1923, at 10:30 o'clock A. M.

New York, November 9, 1923.

Mr. Frank: May I recall Mr. Cosgrove for just one or two questions?

The Court: Yes.

WILLIAM P. COSGROVE recalled.

Further recross-examination.

By Mr. Frank:

Q. Mr. Cosgrove, yesterday I think we remained in some little doubt as to the manner in which the transactions—the original transactions with Coccaro were made. Now, as to the first one, the loan of \$16,000, I think you testified [fol. 187] that you gave that check to McAndrew in Philadelphia, is that right?

A. The check was given to him in Philadelphia, yes.

Q. Now, after the second transaction, the one of \$19,300, do you recall just exactly how that was transmitted to the Irving Bank?

A. Not without refreshing my memory.

Q. Yesterday there was offered in evidence here a check on the Bank of North Philadelphia—

A. North America.

Q. Yes, for \$19,098.96. Now, do you recall offhand whether that check was mailed to the Irving Bank or to Coccaro?

A. It is my belief it was mailed directly to Coccaro.

Q. On what is that belief based?

A. May I have my letter book to refresh my memory?

Q. Yes, surely (handing book to witness). November 13, 1919. Bank of North of North America. While you are looking at that letter I will ask you about the other checks.

Mr. Podell: Here is a copy of the letter (handing paper to Mr. Frank). I think that is the one.

Q. Does that refresh your recollection that that check was mailed to Coccaro?

A. Yes.

Q. Your answer is "yes"?

A. Yes.

Q. I will ask you another question: Now, I show you two papers from Clark, Dodge & Co., and two papers from the Irving National Bank. Does that refresh your recollection as to the method of payment of the transaction for \$8,500 on November 18th, and the transaction of \$5,900 on the same date?

A. May I ask you in what respect do you mean does it refresh my memory?

Q. That is, in what method the sum of \$14,239, which [fol. 188] was the net of that amount, was transmitted to the Irving National Bank?

A. It identifies certain amounts, but I have never seen these documents nor known, that procedure before. After it left our office, I had nothing to do with it.

Q. Have you any letters or books or papers which would indicate in any way how that amount—the discount for those two amounts got into the Irving Trust Company, or the Irving National Bank in New York to Coccaro's account?

A. Yes.

Q. Will you look at it please, and tell us? After having seen these letters and your records, can you testify as to the method by which these sums were transmitted to the Irving Bank in New York?

A. I can.

Q. How?

A. The identical proceeds which we received from the note broker were, in turn, handed by us to the First National Bank of Philadelphia with the request that they wire those funds to the credit of Mr. Coccaro.

Q. Where?

A. At the Irving National Bank, New York City.

Q. And that was done?

A. That was done.

Q. And that was the procedure which likewise took place with regard to the sum of \$35,583 on December 31, was it?

A. I do not believe so.

Q. Look at it and see?

A. The thirty-five thousand and odd dollars on December 31st was represented by a draft of the First National Bank, Philadelphia, on Clark, Dodge & Co., New York City, to our order, which we endorsed to the order of A. J. Coccaro & Co. and mailed to them in New York City.

Mr. Podell: Mailed from where?

The Witness: From Philadelphia.

[fol. 189] By Mr. Frank:

Q. Now, we referred here to various of these papers that were called pledge contracts. Did you ever file or record those pledge contracts in New York City in any public office?

Mr. Podell: I object to that as incompetent and irrelevant.

Mr. Frank: I want to elicit the fact.

The Witness: We did not.

The Court: Wait. Read it.

(Question read.)

The Court: You raised the question in your pleadings. You contend that it is unnecessary to file them?

Mr. Podell: Absolutely.

The Court: What law is there that requires a document of that kind to be filed?

Mr. Frank: Well, I did not want to get into an argument on the question at this time. I would like to elicit the fact. Whether the fact is going to be determinative of the issue or not, it certainly cannot be prejudicial to the issue.

The Court: I do not know whether it can or not. I certainly have no objection, if Mr. Podell does not object. If Mr. Podell insists on his objection——

Mr. Podell (interposing:) The question does not have to be decided at this moment. I shall object to it.

The Court: Very well. On that statement, objection sustained, without ruling now on the question of law.

Mr. Frank: Exception. That is all.

Mr. Podell: That is all.

(Witness excused.)

[fol. 190] EDGAR H. COCKRILL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Cockrill, what firm are you connected with?

A. The corporation of S. B. Lewis & Co.

Q. Where are they located and what is their business?

A. In Philadelphia; the Philadelphia Bank Building, in the business of the purchase and sale principally of commercial paper, promissory notes.

Q. And were they doing or engaged in that business in the latter part of 1919 and the early part of 1920?

A. They were.

Q. What is your connection with that firm?

A. Secretary of the corporation.

Q. And in that capacity have you had occasion to handle any of the paper of the Philadelphia Warehouse Company?

A. We have.

Q. Has the matter been personally in your charge at times?

A. It was.

Q. Have you been asked to produce your files of the paper negotiated in behalf of the Philadelphia Warehouse Company in connection with A. J. Coccaro & Co. in the years 1919 and 1920?

A. We have.

Q. Have you produced those?

A. I have them with me (handing papers to Mr. Podell). These are the transactions, according to the subpoena, and arranged in the order in which they would appear to occur.

Q. Speak louder, please. These are the transactions in accordance with the subpoena and arranged in the order in which they would appear to occur?

A. Yes.

[fol. 191] Q. Now, we will refer specifically to the transaction dated November 19, 1919.

A. You will find those arranged, the paper first descriptive—

Q. (Interposing.) I cannot hear you.

A. I say, the white paper there indicates the order in which those are arranged.

Q. I see. Does your company handle commercial paper for concerns other than the Philadelphia Warehouse Company?

A. We do.

Q. And you make that a specialty, handling commercial paper?

A. Exactly.

Q. Has your company any connection with, is it in the employ of, or has it any relations, or is it part of the Philadelphia Warehouse Company?

A. We are not.

Q. Are any of the officers or members of the Philadelphia Warehouse Company any officers or members of your Company?

A. They are not.

Q. Now, take the papers in this salmon transaction, please, and tell the Court and Jury what was the first thing that your concern received in connection with that transaction (handing papers to witness)?

A. The paper of the Philadelphia—the first thing we received was a due bill, or rather a cashier's check of the First National Bank of Philadelphia for the proceeds of a note.

Q. Well, what note?

A. Notes which aggregated \$8,500, dated November 19th.

Q. That is the other transaction.

A. This is \$8,500.

Q. I want the \$5,900 transaction. That is my mistake. I gave you the wrong file. This is a day later—note the same date?

A. Yes, the same date.

Q. State the transaction I show you now. What was the

first thing that you received in connection with that?
[fol. 192] A. Do you mean—let me ask you a question—
from the Philadelphia Warehouse Company or from—

Q. (Interposing.) From any source?

A. We received from the First National Bank of Philadelphia their cashier's check to the order of the Philadelphia Warehouse Company for the proceeds of the paper that we were to purchase.

Q. Where was the paper?

Mr. Frank: I cannot hear the witness. Please speak louder.

Mr. Podell: Yes.

Q. Where was the commercial paper?

A. In the office of the Philadelphia Warehouse Company.

Q. Is this the paper that you are speaking of (handing paper to witness)?

A. It is.

Q. Now, what did you do? How did you get the money?

A. We took our check—our messenger took our check to the First National Bank.

Mr. Frank: I cannot hear you at all.

The Witness: I say, our messenger took our check to the First National Bank to get a cashier's check to the order of the Philadelphia Warehouse Company for their client, and exchanged the check for the paper.

The Court: I do not quite understand what you mean. To the order of the Philadelphia Warehouse Company for their client—is that the way the check read?

The Witness: No.

The Court: Then you mean to get a check to the order of the Philadelphia Warehouse Company.

[fol. 193] The Witness: Exactly, which was intended for—

The Court (interposing): No, do not tell us what was intended. Just give us the facts that you know.

By Mr. Podell:

Q. I do not know that I am quite clear as to what happened. How did you know you wanted a check from any bank at all?

A. Why, following the custom of the Philadelphia Warehouse Company who notified us that this transaction—

Q. (Interposing.) Then, you received some kind of notification first, did you not?

A. Exactly.

Q. What is the first thing—the very first thing?

A. A telephone conversation.

Q. From whom?

A. The Philadelphia Warehouse Company.

Q. To what effect?

A. That they had a note.

Q. For how much?

A. For \$5,900.

Q. And what did they want from you?

A. They wanted a cashier's check.

Q. For their note?

A. Yes.

Q. And what did you do then?

A. We went to the bank.

Q. Which bank?

A. The First National Bank of Philadelphia.

Q. Did you have the note with you?

A. No.

Q. Who had the note?

A. The Philadelphia Warehouse Company.

Q. How did that get to the bank for discount?

A. That did not then go to the bank.

Q. When did it go to the bank?

A. It did not get — the bank for some time later.

Q. Tell us just what steps were taken?

[fol. 194] A. The First National Bank is not concerned in the note itself—

Mr. Frank (interposing): I object to that statement.

The Court: Yes. Tell us what happened?

Mr. Frank: I move to strike out that part of the answer.

The Court: Yes. Tell us what you ever did with that note, whether you ever got it, when you got, what you did with it, and so forth?

The Witness: We got the note in exchange for a check.

The Court: No. You mean you handed a check and immediately got the note?

The Witness: Exactly.

The Court: All right.

By Mr. Podell:

Q. Now, let us get that clear. That is what I want.

The Court: On what date?

The Witness: November 19, 1919.

Q. First, let me ask you this: were you notified of the amount by the Philadelphia Warehouse Company?

A. We were.

Mr. Frank: I object to the question. He says "of the amount." Of what amount?

The Witness: Of the note.

Mr. Frank: You mean the face value or par of the note?

Mr. Podell: Now, please.

Mr. Frank: All right.

[fol. 195] By Mr. Podell:

Q. As I understand it, the first step in the transaction was that you received notification from the Philadelphia Warehouse Company that it had a note for what?

A. For sale.

Q. For sale?

A. Yes.

Mr. Frank: I object to that as purely a characterization. There was either a telephone conversation, or a letter written, or something done, and the witness' conclusion as to what was done is entirely a characterization.

The Court: No. This is the first time he has put in the words "for sale," and I want to know whether those were the words used over the telephone, or whether it is your conclusion from a previous course of dealing, that that was the situation?

The Witness: Essentially so. They do not use the words—

The Court (Interposing.) I do not know what you mean.

The Witness: That they tell us they have a note for sale.

The Court: But you did not say that at first. We want to know what they said. Give us the conversation. Do not give us your conclusions or guesses or inferences, or anything else. Just give us the conversation. Those other things are for the jury to determine.

Q. Please tell us what was the conversation so far as you can remember it.

[fol. 196] Mr. Frank: I do not like to suggest, but I would like to know whom he spoke to.

The Court: Yes.

Q. Whom did you talk with, if you remember?

A. Some one of the employees of the Philadelphia Warehouse Company.

Q. What did they tell you?

A. That they had a note.

Q. You had handled previously transactions of that character for them before, had you?

A. We had.

Q. And what did you do when you heard that they had a note? Did they tell you the amount of the note?

A. They gave us the various particulars in connection with it.

The Court: Well, tell us what they said as nearly as you can remember it. Let us get through with this. Do not let the lawyer have to drag every word out of you.

The Witness: They had a note for \$5,900 due January 20th, and the number of that note being 22975, to discount at $5\frac{3}{4}$ per cent., \$58.43. The brokerage on the note—

The Court (interposing): Did they tell you those things over the telephone? Did they calculate and give you those figures in that first telephone conversation?

The Witness: Yes, sir.

The Court: All right.

The Witness: These are the figures they gave us, the brokerage of \$7.37, I think it was.

Mr. Frank: Speak louder, please.

The Witness: They gave us the total of the discount and [fol. 197] the brokerage which amounted to \$65.80. The net proceeds were \$5,834.20, and asked us to deliver to them a cashier's check to the order of the Philadelphia Warehouse Company.

Q. Did they tell you all that in the first interview?

A. Yes.

Q. Then what did you do?

A. We drew up a statement, the original—of which this is a copy, made out our check.

Q. Yes.

A. Took our check to the First National Bank, got a cashier's check of the First National Bank, took that check

to the Philadelphia Warehouse Company, and exchanged it for their note.

Q. And got their note?

A. And got their note, and took it back to our office.

Q. What did you do when you got it to your office—what did you do with the note?

A. We very likely hypothecated it in our loans.

Q. In your what?

A. In our loans.

Q. In your loans?

A. Yes; we may have immediately sold it.

Q. Have you got a record of whom you sold it to?

A. We have.

Q. Who did you sell that first note to?

A. That note was sold to the National Rockland Bank of Roxbury, Boston, Massachusetts, was shipped the next day, November 20th.

Q. And is that the bank that has its stamp on the back of this note (handing paper to witness)?

A. That is the bank that bought the note.

Mr. Podell: The paper referred to is Exhibit 24, and I want to ask the jury's specific attention to the stamp of the National Park Bank—of the National Rockland Bank, of Boston, Massachusetts on there.

[fol. 198] Q. What was the purchase price of that note as sold to that bank?

A. The note was sold at $5\frac{3}{4}$ per cent., which was the same rate at which it was bought.

Q. What part did your firm play in the transaction?

Mr. Frank: I think he has already testified fully what part they played.

The Court: Possibly not. He may have gotten a commission on that sale, which was not a so-called commission on the purchase of it.

The Witness: I will have to ask you to repeat the question.

Q. What part did you play in the transaction?

A. As a handler of the note.

Q. Were you a broker?

A. Broker.

Q. What was your firm's compensation in the transaction?

A. We had left to us \$7.37.

Q. For a note of \$5,900?

A. Exactly.

Q. And is that all the compensation that your firm received?

A. That is all.

The Court: Do you mean that quite accurately? Did you not get one day's interest?

The Witness: Yes.

The Court: In other words, you sold it to the Rockland Bank, I assume, with discount from the day on which you actually got the money from them?

The Witness: Exactly.

The Court: So you got the interest on the face of it, on the \$5,900, between the date that you advanced it and the date that you got the Rockland Bank's check?

[fol. 199] The Witness: Yes.

The Court: Did you get any commission on selling as well as on buying, or was there only one commission?

The Witness: Only one commission.

Q. During that time for which you collected the interest for that one day, did you not have your own money up?

A. We did.

The Court: Yes, of course.

Q. I am asking you for the compensation that you received for handling the note; not for putting your money up. Did you get anything more than that seven dollars and odd cents that you have testified to?

A. The interest for the period that we had the note.

Q. And the interest was on your own money?

A. Exactly.

Q. And that would have drawn interest wherever you had it?

A. It would.

The Court: Is that quite accurate? If you had it in Philadelphia in bank, it would not have drawn $5\frac{3}{4}$ per cent., I take it, in the First National Bank? I do not want to contradict you, but I want to get you accurately on the

record. I imagine you do not mean exactly what you have said, or do you?

The Witness: Let me explain to you.

The Court: No. The question asked you was, was it just the amount you have stated? Would it have drawn interest anyway—that interest—if you had had the money in the First National Bank. You drew it out of the First National Bank. If you had left it there, it probably [fol. 200] would not have drawn $5\frac{3}{4}$ per cent. interest for those one or two days, would it?

The Witness: If we had hypothecated the note—

The Court (interposing): I did not ask you that. You did not hypothecate the note?

The Witness: I could not say whether we did.

Mr. Podell: I think the whole business is so small, your Honor—

The Court (interposing): I quite agree with you, but I do not want the witness afterwards, in argument, to be criticised for saying something he did not mean, so I am now only trying to help the witness get on the record exactly what he himself means.

Q. What the Judge would like to have cleared up is this: while your money was on deposit, if it had remained on deposit, instead of withdrawing it in the form that you have described, would your money have drawn interest—

A. (Interposing.) No.

Q. It would not?

A. It would not have drawn interest if it had not been invested in that note, or other notes.

Q. Have you computed that one day's interest? Do you know what it would come out to?

A. Approximately 77 cents.

Q. 77 cents?

A. Possibly. That would be on a \$5,000 note. On \$5,900 it would be a little bit more.

Q. It would not be more than a dollar?

A. No.

Q. So that your total compensation even inclusive of that item of interest, would have come to about \$9 for handling a \$5,900 note?

A. Less than \$9.

[fol. 201] Q. Less than \$9?

A. Yes.

Q. When this note went to the Rockland Bank this paper, did you receive a check from the Rockland Bank in Boston?

A. We did.

Q. And have you got the other documents in this transaction?

A. Which do you mean? The bill of sale?

Q. Any documents at all. I want all of them.

A. Yes, you have them.

Q. Now, did the Philadelphia Warehouse Company in any wise inform you or advise you as to where you should discount this paper, or to whom you should sell this note?

A. They did not.

Q. And in the course of your business, did you deal with banks all over the country in the sale of commercial paper?

A. We did.

Q. Were the Philadelphia Warehouse Company apprised by you or informed by you as to what bank you had sold the paper to?

A. They were not.

Q. Now, I show you first a check and ask you whether that is a cancelled voucher for the check that you actually paid to the Philadelphia Warehouse Company, \$5,834.20, on the 19th day of November 1919, (handing paper to witness)?

A. This check was not paid to the Warehouse Company.

Q. To whom was it paid?

A. To the First National Bank of Philadelphia.

Q. And did they, in turn, give you their check?

A. They did.

Q. And was this check from the First National Bank of Philadelphia then sent to the Warehouse Company?

A. It was.

Q. And they, in turn, gave you what?

A. Their note.

[fol. 202] Q. Now, here is another check for \$5,830.67, will you tell us what was that (handing paper to witness)?

A. That was a check on the Girard National Bank, issued by us, signed by myself, dated January 20, 1920, for \$5,830.67, drawn to the order of due bill—

Mr. Frank (interposing): I object to the check being read in evidence.

The Court: Yes.

Q. Was this a check given on renewal?

A. We were not informed that it was.

Q. You did not know whether it was a renewal or a new transaction, is that it?

A. So far as we were concerned, it was a new transaction.

Q. And was the same machinery gone through that you have described, on January 20th—

Mr. Frank (interposing): I do not like to interrupt, but I do not know whether those checks have been offered.

Mr. Podell: I will offer them.

Q. And was the same machinery gone through that you have described on January 20th, when this paper came due?

A. It was.

The Court: You mean including the discount with the Rockland, or up to that point?

The Witness: Up to that point.

Q. And what bank did you sell the January 20th notes to?

A. One note of \$2,500 was sold to the Windber Trust Company of Windber, Pennsylvania—

Q. (Interposing.) Now, I call your attention to Exhibit No.—I guess it is part of the other exhibit, is it not—part [fol. 203] of Exhibit 31?

A. The note number is 23275.

Mr. Podell: Note No. 23275 for \$2,500, dated January 20, bears the endorsement of the Windber Trust Company.

Q. Did you sell that to the Windber Trust Company?

A. We did.

Q. Did the Philadelphia Warehouse Company in anywise tell you to sell it to that company?

A. They did not.

Q. Did they tell you to sell it to any company in particular?

A. No.

Q. Did you advise the Philadelphia Warehouse Company that you were selling it to the Windber Trust Company?

A. We did not.

Q. And what did the other note of the same date—what happened to that?

A. It was sold to the Manayunk National Bank of Philadelphia.

Q. That is the \$3,400 note?

A. Yes, sir.

Q. And how much did you get for both those notes, or you may give us the respective amounts?

A. The bills you have attached there to an exhibit there that I call—

Q. (Interposing.) Yes, but do not talk to yourself, please; speak up so that we will get the benefit of it too.

A. You have the bills attached to another transaction, called 3-B. The yellow bills. It is not possible to determine the exact amount of the proceeds of the particular note, because the paper was sold with various other notes of the Philadelphia Warehouse Company to those institutions, as shown by these copies of bills.

Q. You mean that there was a lump sum received for various other notes, including this particular one?

A. I do.

[fol. 204] Q. Well, would your statement—is this a statement that you sent to the Philadelphia Warehouse Company (handing paper to witness)?

A. It is.

Q. And does that statement show the amount realized on both those notes?

A. Which statement?

Q. The one you sent to the Philadelphia Warehouse Company.

A. That would not show the amount realized on the notes.

Q. Well, would it show the amount sent to the Philadelphia Warehouse Company?

A. It would.

Q. As a result of that?

A. Yes.

Q. And what was the amount you sent to the Philadelphia Warehouse Company?

A. \$5,830.67.

Q. And that is the net proceeds of the two notes, one for \$2,500 and one for \$3,400?

A. It is.

Q. Now, you have in each of these note sales or transactions that you have referred to, you have the docu-

ments that accompanied them and the cancelled checks—have you them here?

A. I do not believe I understand your question clearly.

Q. Well, you have produced certain papers here, Mr. Cockrill—these papers (indicating)?

A. Yes.

Q. Are they taken from your files?

A. They are.

Q. And are they all of the papers that you have in connection with each of these transactions?

A. They are.

Q. And have you brought with you such cancelled checks or vouchers as figured in these transactions, and which you had the cancelled vouchers of?

A. We have.

Q. And are they all here in these papers?

A. They are.

Mr. Podell: Now, I offer them all in evidence.

Mr. Frank: No objection.

[fol. 205] Q. Now, will you be good enough to get together the papers in the one transaction that you have talked about?

Mr. Frank: Just ask the witness, please, or some one of your staff to mark them as one exhibit, and take out any private memoranda that are not intended to be offered in evidence, and then I would like to see them.

Mr. Podell: Well, there are no private memoranda.

Mr. Frank: Or any summaries which are not part of the exhibit.

Mr. Podell: Well, there is a summary, yes,

The Witness: That describes the whole transaction.

Q. Is that part of your records?

A. The white paper is not part of our records.

Q. How did you come to prepare it?

A. From the subpoena.

Mr. Frank: I have no objection to that. It may help in understanding it.

Mr. Podell: Yes.

Mr. Frank: I would like to look at them, however.

Mr. Podell: Yes.

(Papers marked Plaintiff's Exhibit 46.)

By Mr. Podell:

Q. Now, do I understand you that in each of these instances you would be notified that the Philadelphia Warehouse Company had a note?

A. We would.

Q. And the amount of that note?

A. We would.

Q. And then you would make out your check?

[fol. 206] Mr. Frank: I do not want to interrupt, but I think the witness has testified fully in answer to your Honor's questions.

The Court: Yes.

Mr. Podell: He has testified in answer to the Court's questions about the transaction of November 19th.

The Court: Yes.

Mr. Podell: But I want to take up each transaction separately.

The Court: He has already testified, has he not, that it was all the same way?

Mr. Frank: In answer to counsel's question he said they used the same machinery in every transaction.

Mr. Podell: Well, I do not know that that question went as far as that, your Honor. I do not recall that it covered all these transactions, and it seems to me——

The Court (interposing): I understood it to cover all of them. It may be deemed to have covered them.

Mr. Podell: Does your Honor think the situation is clear to the jury?

The Court: Yes.

Mr. Podell: Because there were so many questions thrown at this witness.

The Court: I know.

Mr. Podell: That I doubt whether it is entirely clear in the minds of the jury.

The Court: I think it is.

Mr. Podell: That is all.

Cross-examination.

By Mr. Frank:

Q. Now, Mr. Cockrill, your place of business is about a block away from the Philadelphia Warehouse Company's [fol. 207] place of business, is it?

A. Yes.

Q. And these transactions were transactions of daily occurrence, were they not?

A. Not necessarily every day, but of usual occurrence.

Q. What?

A. Frequent occurrence.

Q. You mean almost every day, do you not? Were they not an everyday business?

A. They might be.

Q. Well, now, were you in the office of this S. B. Lewis & Company all the time?

A. Most all of the time, yes.

Q. And you had charge of these transactions that you have testified about?

A. I had.

Q. And you knew that was almost a daily occurrence, was it not, having notes of the Philadelphia Warehouse Company to handle?

A. It was.

Q. Now, can you give us any idea of what amount of business you did in the year 1920 in handling the Philadelphia Warehouse Company's notes?

A. I have no recollection.

Q. Well just roughly?

A. It might have been two million dollars worth of paper; may be more; possibly less.

Q. Now, they had a messenger come over there regularly, did they not, without any telephone conversation?

A. No, they did not.

Q. Did you not know what was required when a messenger boy came over with a bunch of notes?

A. They did not send their messenger to our office.

Q. Did you send your messenger to their office?

A. We did.

Q. And then he was handed a bunch of papers, was he?

A. He was.

Q. And he brought them back to you?

A. He did.

[fol. 208] Q. So there was a telephone conversation first?

A. There was.

Q. And in that telephone conversation you would get the amount of whatever the transaction was?

A. We did.

Q. And did you prepare these notes, or were they prepared in the Philadelphia Warehouse Company's office?

A. The Philadelphia Warehouse Company prepared their own notes.

Q. That is, they were on printed forms, were they not?

A. They were.

Q. And the name of the bank was already printed on these forms?

A. It was.

Q. One of those names was the Chase National Bank of New York City, was it not?

A. It was.

Q. And the only thing that had to be filled out was the date, the due date and the amount, is that right?

A. And the signatures.

Q. And the signatures?

A. Yes.

Q. Then, after being informed that the Philadelphia Warehouse Company had some business for you, the next thing that you did was to draw your check, was it?

A. It was.

Q. And that would be before you saw the actual note?

A. It would.

Q. Sometimes a day before?

A. No.

Q. Well, what was the longest period that would be?

A. Possibly fifteen or twenty minutes; maybe an hour.

Q. At any rate, before you saw the note you would have your check drawn?

A. Yes, sir.

Q. And your check was on your account in—what is it—the First National Bank of Philadelphia?

A. It might be on various banks.

Q. You had accounts in various banks?

A. We did.

[fol. 209] Q. Now, in this particular transaction about the

\$5,900 note, you had an account in the first National Bank of Philadelphia?

A. We did.

Q. And this particular check you drew on the First National Bank of Philadelphia?

A. We did.

Q. And then that check was sent over to the Philadelphia Warehouse Company?

A. Not our check; a check of the First National Bank of Philadelphia.

Q. Let me see if I understand you. You had an account in the First National Bank of Philadelphia?

A. We did.

Q. Then what are you getting at, I presume, is that you would get a cashier's check out of that bank to the order of the Philadelphia Warehouse Company, is that right?

A. Yes.

Q. That was the purpose of the operation?

A. Yes.

Q. And you drew your check to whose order?

A. To the order—in whatever particular way the check was made out. Maybe a cashier's check, to the order of banks or the Philadelphia Warehouse Company as the case may have required.

Q. That is, if you drew your own check on the First National Bank of Philadelphia—

Mr. Frank: I would like to have those checks that were not offered in evidence, that you were reading just now.

Mr. Podell: They were offered in evidence.

Mr. Frank: Then I would like to see them.

(Papers handed to Mr. Frank by Mr. Podell.)

Q. Now, in this particular case the check you drew was [fol. 210] made pay- to the order of cashier's check, quotation marks, Philadelphia Warehouse Company; that was the sort of check that you drew, was it not?

A. We did.

Q. And that was before you got the note?

A. It was.

Q. And then you sent that check over to the First National Bank of Philadelphia, and asked them to make a check for the same amount to the Philadelphia Warehouse Company?

A. We did.

Q. And then what did you do with that check? Sent it direct to the Philadelphia Warehouse Company?

A. We did.

Q. Now, up to that time you had not said anything about selling the note to any other person, to the Philadelphia Warehouse Company?

A. No.

Q. You had simply had them tell you that they had a note that they were going to send to you, and then you would send them a check for that amount?

A. We did.

Q. That was the transaction?

A. Yes.

Q. Is that right?

A. That is right.

Q. And you did that in every case?

A. Correct.

Q. So the Philadelphia Warehouse Company was not concerned with who you sold it to, because they had the money already, did they not?

A. When we gave it to them for their note.

Q. That is the reason that you did not tell the Philadelphia Warehouse Company which of these other banks you subsequently disposed of the note to?

A. Not the reason, no.

Q. Well, at any rate, they had your money before it was sold to any other bank, did they not?

A. They did.

[fol. 211] Q. And I think you answered in answer to a question on direct examination, that sometimes it was a week before you ever saw the note?

A. No, sir.

Q. It was always the same day?

A. Always the same day.

Q. Now, in this particular transaction of the \$5,900 note—

The Court (interposing): Did you say saw?

Mr. Frank: Saw.

Q. How long after you had given your check to the Philadelphia Warehouse Company was it that you would sell these notes to other banks?

A. That would be a matter of time; never a certain time.

Mr. Podell: What is that?

The Witness: Never a certainty.

Q. What I understood from your direct examination was that sometimes it would be a week before you sold it to another bank?

A. It might be; it might be longer, it might be less.

Q. And this particular note you say you sold the next day?

A. According to the records.

Q. Now, the rate of discount on the original transaction of the \$5,900 was $5\frac{3}{4}$ per cent plus charges, was it?

A. It was.

Q. What was the rate of renewal of that same note? Can you tell us that?

A. If you will give me the papers, I will show you.

Q. Whether you described it as a renewal or not, the fact is that there originally was a note for \$5,900, is that right?

A. There was.

[fol. 212] Q. The original loan was made on November 18, for the sum of \$5,900, is that correct?

A. Yes.

Q. That note was a two months' note, 60 day paper, was it not?

A. The bill would indicate just how long it ran for.

Q. That would fall due on January 20?

A. Yes, but that was a 62 day note.

Q. A 62 day note?

A. Yes.

Q. Now, on January 20, there was either a renewal note or another note, and how much was that for?

A. \$5,900.

Q. Now, what was the rate of discount on that note?

A. Six per cent. per annum.

Q. And the other one had been how much?

A. $5\frac{3}{4}$ per cent. per annum.

Q. Now, that note was for how long?

A. Beg pardon?

Q. How long a note was that? 62 days likewise?

A. 63 days.

Q. 63 days?

A. Yes.

Q. And that would make it expire on March 23, would it not?

A. It would.

Q. And on March 23, what, if anything, was done with reference to that transaction?

A. Nothing, so far as we know.

Q. What is that?

A. Nothing, so far as we know.

Q. Well, did you charge the discount of \$86.04 with reference to that transaction on the date that that note was renewed?

Mr. Podell: What date, please?

Mr. Frank: March 23.

Mr. Podell: I object to that. There is no evidence that it was renewed then. That is the Centennial Bank discount.

Mr. Frank: All right.

[fol. 213] Q. When the note of \$5,900 fell due, you say there was a new note for the same amount issued?

A. Fell due on what date?

Q. After 60 days or 62 days?

A. Which note are you referring to? The first or the second note?

Q. The \$5,900.

The Court: When it fell due the first time or when it fell due the second time?

Q. When the \$5,900 note, which was made on November 18, for 62 days, fell due it was taken up and paid, was it?

A. Yes.

Q. And who took it up and paid it?

A. The Philadelphia Warehouse Company.

Q. And then you say there was another note for which you issued a check; is that right, for the same amount?

Mr. Podell: Two notes.

Mr. Frank: All right.

Q. Two notes making a total of \$5,900, is that right?

A. Yes.

Q. And on that date, that is 62 days from November 18, did you again draw a check on the First National Bank of Philadelphia, to the order of the Philadelphia Warehouse Company?

A. This was a check—a cashier's check given to the order of the Philadelphia Warehouse Company.

Q. That is on the date on which the first note expired?

A. On January 20, the same date.

Q. That is, you gave your check for \$5,900 less discount to the Philadelphia Warehouse Company before you got another note for \$5,900, is that right?

A. Our check was not given—

Q. (Interposing.) I mean you sent your check to the bank, and the bank gave a cashier's check to the Philadelphia Warehouse Company, is that right?

A. They did.

Q. But that machinery took place before the Philadelphia Warehouse Company's notes totalling \$5,900 came over to you; is that right?

A. It was.

Q. And did you sell it to the same banks that you had sold the original note or notes for \$5,900 to?

A. We did not.

Q. And did you guarantee the notes that you sold?

A. We did not.

Q. If moneys were paid on account of these notes before the due date, were they paid to you in any instance?

A. They were not.

Q. Did you ever make or allow to the Philadelphia Warehouse Company on any of these notes any remission of interest or charges?

A. There is no record of it having been so.

Q. Well, I assume that means that you did not? I mean, there would be a record if you had done so?

A. There would be.

Q. So your answer is that that was never done, as far as you are able to tell us?

A. No, not in these transactions.

Q. Did you know that the sum of \$7,600 had been paid on account of one of the notes before its due date?

A. We did not.

Mr. Podell: I object to that, your Honor. These notes would not be paid to him. They would be paid to the person—

The Court (interposing): He said they were not paid to him, but he is asking whether he knew about this payment.

Q. Did you know that there was a note which had been extended on March 9, 1920?

The Court: March 9 or March 7?

[fol. 215] Q. March 9, due May 7, 1920, in the sum of \$15,200?

A. We were never advised of anything being an extension.

Q. Then, let us call it by any other name. Did you know that a note was made or notes were made on March 9, 1920, due May 7? Would your records show that?

A. They might.

(Informal recess.)

Redirect examination.

By Mr. Podell:

Q. Mr. Cockrill, is there a recognized rate in the market for commercial paper from day to day?

A. Determined by the fluctuations of the market.

Q. And the market fluctuates from day to day?

A. It does.

Q. And between what range does it usually fluctuate?

Mr. Frank: I object to that.

Mr. Podell: I withdraw it.

Q. Between what rates did it fluctuate in the later part of 1919 and the early part of 1920? Give us the lowest and the highest, as far as you can remember.

Mr. Frank: I object to that as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Frank: Exception.

A. My recollection is between $5\frac{1}{2}$ and $7\frac{1}{2}$ per cent.

Q. What was the credit standing of the commercial paper of the Philadelphia Warehouse Company, as far as you knew?

A. First class.

Mr. Podell: That is all.

Mr. Frank: No further questions.

[fol. 216] The Court: Just a moment. In connection with the first question I asked you, I am not quite clear now as to these original telephone conversations. You said that when the Philadelphia Warehouse Company called you up they gave you, in addition to the face of the note and the time—they gave you the discount rate, $5\frac{3}{4}$ per cent., and the amount, and that the custom was to do that all the time. The specific thing as to which I am not clear is who fixed the discount rate for each particular note, you or they?

The Witness: We.

The Court: Well, then, how did they know when they first called you up on the 'phone, that on this particular note on that date the rate was to be $5\frac{3}{4}$ per cent?

The Witness: They simply asked whether there was any change in the rate, and we answered "No."

The Court: Then that was part of the conversation each time?

The Witness: Yes, but—

The Court (interposing): That you did not state before.

The Witness: It is not always part of the conversation, but it is sometimes.

The Court: I am only trying to get the facts; I am not trying to corner you or anything like that. That is not my function, but I am trying to get the facts. You say they do not always do that. Well, if they do not always do it, do they always tell you the amount of the discount and the [fol. 217] amount of the note—they could not give you the amount of the discount without the discount rate—do they always do that on the 'phone?

The Witness: They have first calculated the discount.

The Court: Without knowing what they were going to discount it at?

The Witness: No, they have known perhaps three or four days, or maybe a week or two weeks, or possibly a month what the rate was, and when there is any change, any change in the rate we notify them, and they continue on that basis until we again notify them of a change, whether upward or downward.

The Court: I see. Then it is not necessarily at the time of the conversation in reference to the discounting of a particular note that you advise them of the discount rate?

The Witness: Not necessarily.

The Court: You advise them when a change is to be effective?

The Witness: That is it.

The Court: Then from that time on until further notice, they assume the rate you have given them is the discount rate for their paper?

The Witness: That is right.

The Court: Now, one further question: You said in this instance, you discounted it at the Rockland Bank at $5\frac{3}{4}$ per cent., and that each transaction went along in the same way, except that when I asked you whether you meant that [fol. 218] each transaction was a discount at the Rockland Bank, you said no. I intended to ask you at that time did you mean that each discount transaction by you, in the disposition of their paper, was at the same rate at which you purchased the paper from them?

The Witness: In these particular transactions——

The Court (interposing): No, in other transactions; generally was there an absolute uniformity, or did you sell them for whatever rate you could get in the market, whether more or less or the same?

The Witness: If we were ever able to sell it at a lower rate than we purchased, the amount—the difference between the rate bought and the rate sold was rebated to the company, whom we understood, in turn, returned it to their client.

The Court: Well, you do not know anything about their returning it?

The Witness: No.

The Court: What you do say is that if after purchasing a note at $5\frac{3}{4}$ per cent. you were able to sell it, say, on a $5\frac{1}{4}$ per cent basis, that that difference would not be retained by you, but would be rebated to the Philadelphia Warehouse Company?

The Witness: That is correct.

The Court: That was your practice?

The Witness: That is right.

The Court: Now, in any of the notes that are involved in these deals, was there a disposition by you at a lower or a higher discount rate than that at which you took it from them?

[fol. 219] The Witness: In some of the papers that are submitted, I think there is one transaction that shows the

paper sold at a rate higher than that at which it was bought. In all the others the paper was sold at the rate at which it was bought.

The Court: Did they reimburse you the difference?

The Witness: They did not.

The Court: In that one instance in which you——

The Witness (interposing): No.

The Court: Did you ask them for reimbursement?

The Witness: We did not.

The Court: How was that?

The Witness: We simply took it with the times, as things were.

The Court: I do not quite understand. You say it was your practice to reimburse them if you sold at a lower discount rate. Was it your practice, and was this simply one instance in which you did not follow the practice, or was it not your practice, to get reimbursements from them in those cases in which you had to sell at a higher discount rate?

The Witness: It was not our practice.

The Court: Then, in other words, you stood the loss?

The Witness: We did.

The Court: And they made the profit, if there was a profit? If there was a loss, you stood it?

The Witness: I do not know that the warehouse company made a profit.

[fol. 220] The Court: Well, I know you do not know who made the profit. As between you and the warehouse company, they made a profit, if you succeeded in selling their paper, which you had bought, at a lower discount rate than that at which you had bought it, but you stood the loss if you failed so to succeed, and if you had to sell it at a higher discount rate than that at which you had bought it, is that correct?

The Witness: That is correct.

The Court: All right.

By Mr. Podell:

Q. Did that occur in any more than that one instance?

A. In these particular cases I do not remember that it does.

Q. But the purchase by the company, when it was made,

was made upon your representation to them that that was the current rate?

A. I do not believe I get your question.

Q. When your company figured $5\frac{3}{4}$ per cent., it figured it on that rate because that is the rate you had given them?

A. It was—that is correct.

Q. And that was the rate which was then current?

A. That is right.

Q. And then if subsequently you found you made a mistake, so that the rate was higher, you shouldered your loss yourselves?

A. We did.

Q. And if you found you were able to get it at a lower rate than that, you rebated the difference to them?

A. We did.

Recross-examination.

By Mr. Frank:

Q. You just answered Mr. Podell, saying that if you subsequently found you made a mistake—is that really what you meant?

[fol. 221] The Court: Or that the market changed.

The Witness: Well, if you care to put it that way.

The Court: No. Which way do you put it?

The Witness: It would be a case of mistaken judgment with regard to the market condition.

Q. Then, what you told them would not be the actual market rate, but what your judgment was of the market, of what it was going to be?

A. We gave them the current market rate.

Q. Then you never made a mistake; if you gave them the current market rate, you knew it?

A. We did.

Q. So there was no mistake made at the time you gave it to them?

A. Right.

Q. And what you refer to as a "mistake" would be a change in the market between the time you gave that quotation to the Philadelphia Warehouse Company and the time you came to act upon that rate, is that it?

The Court: The time you disposed of the paper?

The Witness: Yes, the time we disposed of the paper.

Q. So when you say "mistake," that is not exactly what you intended?

A. No, it is not a mistake.

Further redirect examination.

By Mr. Podell:

Q. As matter of fact, so that we will have this entirely clear, the Philadelphia Warehouse Company never asked [fol. 222] you to keep that paper any length of time, did it?

Mr. Frank: I object to that as leading.

Q. Did the Philadelphia Warehouse Company ever ask you to keep its paper for any length of time?

A. They did not.

Q. If you kept it for a week or ten days, and the market increased as a result thereof, was there any reason that you know of why the Philadelphia Warehouse Company should make good any loss to you?

A. None.

Q. What is your business?

The Court: That has been testified to.

Q. As such broker, did you consider it was fair and reasonable or in accordance with the law that you should make any profit other than your commission?

Mr. Frank: I object to that.

The Court: Sustained.

Md. Podell: Exception.

The Court: What he considers is not the point. He has testified to what he did.

Mr. Podell: Your Honor has asked him for the operations of his mind.

The Court: No, I have asked him only for the actual transactions. I have not asked a word about the operations of his mind. At least, I did not intend to.

Mr. Podell: That is all.

Mr. Frank: No further questions.

(Witness excused.)

[fol. 223] FRANK GALLAGHER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Gallagher, what were you doing in November of 1919?

A. Checker for the New York Central.

Q. And where were you stationed as checker for the New York Central?

A. Piers 16 and 17, New York.

Q. Piers 16 and 17, New York?

A. Yes.

Q. I show you two slips of paper, taken from the files of the New York Central, and ask you whether they have your handwriting on the back (handing papers to witness)?

A. Yes, they have.

Q. Did you check the lot that came over at that time?

A. Yes.

Q. And did you check each case, and does your checking appear on the back?

A. Yes, sir.

Q. Did you total up the total number of cases?

A. Yes, sir.

Q. And how many were there?

A. 1,000 on that.

Q. What is the figure on the back there? On this here (indicating)?

A. 999.

Q. Well, what are those two figures—1,000 and 999—can you tell us?

A. What is that?

Q. There is one figure here "999" and one here "1000" (indicating).

A. Well, that is my checking, 1,000.

Q. Do you recall that one of the cases was empty?

A. That is the man that delivered that.

Q. Which is the man that delivered it?

A. The delivery clerk.

Q. The delivery clerk's figures?

A. Yes.

[fol. 224] Q. Do you recognize them?

A. Yes.

Q. Well, is it on the same shipment?

A. Yes, the same shipment.

Q. Does it appear that there were 1,000 cases on one checking slip, and on the other checking slip only 999?

A. That is not mine at all.

Q. I know that is not yours, but do you recognize the handwriting? Who wrote that, do you know?

A. I could not say who wrote that. The delivery clerk on the pier, I think.

Q. Who?

A. The delivery clerk.

Q. Is that the delivery clerk's figures?

A. Yes.

Q. You notice it is "999"?

A. Yes.

Q. And do you notice it is the same shipment?

A. Yes, it is.

Q. It is the same shipment?

A. The same car.

Q. You had checked 1,000, and the delivery clerk checked 999 for the same car?

A. Yes.

Q. For the identical car?

A. Yes.

Mr. Podell: Now, that is Exhibit No. 45, that the witness has been shown—Exhibits 44 and 45. That is all.

(No cross-examination.)

(Witness excused.)

WILLIAM T. STEVENSON, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. What is your occupation, please?

A. Chief Clerk, Claim Department, New York Central.

Q. Have you been requested to produce the records with respect to a claim in connection with the shipment of 1,000 [fol. 225] cases of salmon?

A. Yes, sir.

Q. And have you got those records?

A. Yes, sir.

Q. Let me take them, please.

A. (Handing papers to Mr. Podell.)

Q. Now, so that we will not be taking up too much time, I will ask you simply whether there was a claim made that there was one case short on that shipment of 1,000 cases?

A. Yes.

Q. And that it had been reduced to 999 cases?

A. Yes.

Q. And that your delivery clerk's check showed only 999 instead of 1,000?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. The same shipment?

A. Yes, sir.

Q. Of salmon?

A. Yes, sir.

Mr. Podell: That is all.

(No cross examination.)

(Witness excused.)

JOSEPH DeCUNZO, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. DeCunzo, in 1919 and the early part of 1920, what were you doing?

A. Foreman of the warehouse.

Q. What warehouse.

A. The Yorke Warehouse.

Q. And what floor—floorman or foreman,

A. Foreman—had charge of the warehouse.

Q. Do you remember a lot of 999 cases of salmon that came in to the warehouse?

A. I do.

Q. Were you personally there when they were counted, when they came in?

A. I counted them when they came in.

[fol. 226] Q. You counted them when they came in?

A. Yes.

Q. How many were there?

A. 999.

Q. Were you there when they went out?

A. Yes.

Q. And did you count them when they went out?

A. Every time they went out, yes, sir. I don't know how many times they went out.

Q. You mean they went out in separate lots?

A. Yes, separate lots.

Q. When you total up all the lots that went out, how many went out?

A. 999.

Mr. Podell: That is all.

Cross-examination.

By Mr. Frank:

Q. Were you there every time any lot of salmon went out?

A. Well, I don't quite remember, but I am always there when anything goes out.

Q. You mean everything that goes out of the warehouse you personally check out?

A. Well, as the orders come in, I give the stuff out. It might be a two-hundred lot or three-hundred lot, or whatever they called for.

Q. Was there any time that anything was taken out of the warehouse, that you were not there yourself to see it?

A. Well, I don't know; after hours I could not tell you.

Q. Did you have any assistants? Were you the only man running the whole warehouse?

A. I had charge of the inside of the warehouse.

Q. There were two warehouses, were there?

A. Yes, sir.

Q. Did you have charge of both of them?

A. No, sir.

Q. Which one did you have charge of?

A. Tenth Street and Greenwich Street.

[fol. 227] Q. They were called No. 1 and No. 2. Which was yours?

A. I don't remember the numbers now.

Q. You tell this jury that every time anything went out—

A. (Interposing.) I had to have a slip.

Q. I did not ask you that. You personally were always there any time anything went in or out?

A. Yes, sir.

Redirect examination.

By Mr. Podell:

Q. What part of the building were these salmon kept in?

A. On the third floor, I think it was—on the west of the third floor.

Q. The western part of the third floor?

A. Yes, on the Greenwich Street side.

Q. On the Greenwich Street side?

A. On the Tenth Street side, rather.

Recross examination.

By Mr. Frank:

Q. You did not open any of these boxes?

A. No, sir.

Q. To see whether there was salmon or anything else in them?

A. No, sir.

Q. Were they in plain wooden boxes?

A. No; tins in boxes.

Q. Can you read and write?

A. Can I read and write?

Q. Yes.

A. Yes, sir.

Q. Was there marking on the outside of the boxes?

A. There were marks on the outside, yes.

Q. Do you know what marks there were?

A. No, I don't remember the marks.

Q. You did not open any of the boxes?

A. No, sir.

[fol. 228] Q. Was there any other salmon, so far as you know, in the warehouse at any time?

A. I don't quite remember that.

Mr. Frank: That is all.

Mr. Podell: That is all.

(Witness excused.)

JAMES POLITO, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Podell:

Q. Mr. Polito, what were you doing in 1919?

A. In charge of the trucking department of the Yorke Storage & Warehouse Company.

Q. I show you a slip on the back of Exhibit No. 45, and ask you whether you recall the writing on that slip (handing paper to witness)?

A. Yes, sir.

Q. By whom was it written?

A. Signed by each individual driver for each individual load.

Q. And when was it signed? Were those drivers under your supervision?

A. Yes, sir.

Q. And what is the total of loads that those drivers signed for?

A. Six loads.

Q. And how much do they aggregate? How many cases of salmon do they aggregate?

A. 999 cases.

Q. Do you remember the shipment when it came in?

A. Yes, I do.

Q. Were you there when it came in?

A. I believe I was.

Q. Whom did you have checking the merchandise in at the warehouse?

A. De Cunzo was the foreman, and O'Donnell was the checker, and Samut was the store bookkeeper.

[fol. 229] Q. Who was Kelly? What did he do?

A. He was my assistant.

Q. Working under you?

A. Yes, sir.

Q. Do you recognize his handwriting?

A. Yes, sir.

Q. I show you a copy of a paper from the files of the Yorke Storage Warehouse, and ask you whether you recognize the handwriting thereon (handing paper to witness)?

A. Kelly's handwriting.

Q. That is Kelly's handwriting?

A. Yes.

Q. And do you see the total there, the cases that Kelly wrote down?

A. I do.

Q. And how many is it?

A. 999 cases.

Q. What book is this?

A. Trucking record.

Q. And is that a record made at the time of the receipt of the merchandise?

A. Yes.

Mr. Podell: I offer that in evidence.

Mr. Frank: May I see it, please?

Mr. Podell: Yes, surely (handing book to Mr. Frank).

(Book marked Plaintiff's Exhibit No. 47.)

Q. You signed the warehouse receipt which was given to Seeman Brothers, did you?

A. I will have to see it, before I can say.

Q. I show you a copy of warehouse receipt bearing date February 20, 1920, and ask you whether that bears your signature (handing paper to witness)?

A. Yes, sir.

Q. In whose handwriting is the body of that receipt?

A. Samut's.

Q. And you issued that receipt to whom?

A. Seeman Brothers.

Q. And for what?

A. 999 cases Pink Salmon.

[fol. 230] Mr. Podell: I offer this copy in evidence, unless you have the original.

Mr. Frank: No, I have no objection to it.

(Paper marked Plaintiff's Exhibit No. 48.)

Q. Now, who told you to sign that receipt?

A. Mr. Samut.

Q. Mr. Samut?

A. Yes.

Q. And under whose instructions were you acting at the time?

A. Cocarro.

Q. Are you related to Cocarro?

A. A nephew.

Mr. Podell: That is all.

Cross-examination.

By Mr. Frank:

Q. Who were the officers of the York Storage & Warehouse Company at the time?

A. Mr. Marsh was President, and I was Treasurer.

Q. And was Samut any officer of the corporation at that time?

A. No, sir.

Q. Do you know of any instance of Samut signing any warehouse receipts?

A. You speak of negotiable or non-negotiable?

Q. Negotiable?

A. Not that I know of.

Q. Or non-negotiable?

A. He may have signed some of the non-negotiable, but I don't remember that.

Q. Generally, what was the practice or custom of the warehouse with reference to signing warehouse receipts, either negotiable or non-negotiable?

A. Either Mr. Marsh or myself would sign.

Q. Sometimes would both sign?

A. Negotiables, yes.

Q. Or non-negotiable?

A. Non-negotiables only called for one signature, if I remember correctly.

Q. Did you testify as a witness before the Grand Jury in the matter of the indictment against A. J. Coccaro?

A. I did.

[fol. 231] Q. Was Mr. Cosgrove, of the Philadelphia Warehouse Company, also a witness before the Grand Jury?

A. I believe he was.

Q. Did you meet him there in the District Attorney's office?

A. I think I did see him there.

Q. Before you went there, did you go to the office of Leventritt, Carns, Riegelman & Goetz, the plaintiff's attorneys?

A. No, sir.

Q. Did you go there subsequently to that?

A. No, sir.

Q. That indictment was in the month of July or August, 1920, was it not?

A. I don't remember the date.

Q. Well, approximately?

A. I can not say.

Q. If I recall to your mind that the bankruptcy was May 20, 1920, would that recall to your mind the date when you went to the District Attorney's office or the Grand Jury?

A. I don't remember the month it was.

Q. Well, have you any idea how long it was after the bankruptcy?

A. About two or three months.

Q. And at that time did Mr. Cosgrove speak to you about any of the merchandise that had been in the Yorke Storage & Warehouse Company's warehouse?

A. No, sir.

Q. At that time, that is, two or three months after the bankruptcy, was the Yorke Storage & Warehouse Company still doing business?

A. After the bankruptcy?

Q. Yes.

A. Yes, sir.

Q. How long did they continue doing business after the bankruptcy?

A. Well, I left the Yorke Storage & Warehouse Company, I think it was, in the month of July, and how long they continued on I can not say.

[fol. 232] Q. Well, that is after the bankruptcy and in the month of June it was still doing business?

A. Oh, yes.

Q. And all these books and records which you have identified here were still in the warehouse building at that time?

A. Yes, sir.

Mr. Frank: That is all.

Mr. Podell: That is all.

(Witness excused.)

Mr. Podell: Now, will it be stipulated that Mr. Paul Cooksey was chosen by the creditors to act as president?

Mr. Frank: Just stipulate the whole thing.

Mr. Podell: What was the whole thing?

Mr. Frank: It is stipulated that after the bankruptcy of A. J. Coccaro & Company, the business of the Yorke Storage & Warehouse Company was conducted by a committee of creditors, consisting of Paul Cooksey, Mr. Cosgrove, of the Philadelphia Warehouse Company, Benjamin Lesser, the trustee in bankruptcy, Mr. Kerr, attorney for a creditor, and one other person.

Mr. Podell: And Mr. Cooksey was, by them, chosen to be the president?

Mr. Frank: Yes, Mr. Cooksey was chosen to be the president, and managed the warehouse until October, I understand. How long did he manage it?

Mr. Cosgrove: I can not recall.

Mr. Frank: Well, according to your best recollection, for how long a period?

Mr. Podell: For at least a year, I should say.

[fol. 233] Mr. Frank: For at least a year. That will do.

Mr. Podell: Will your Honor permit me to ask Mr. Cosgrove just one question?

Mr. Frank: I want to add to that stipulation the date that that committee took charge of the warehouse. They can give us that date approximately.

Mr. Cosgrove: I do not know. It was very shortly after the bankruptcy.

WILLIAM P. COSGROVE recalled:

Further redirect examination.

By Mr. Podell:

Q. Mr. Cosgrove, what was the credit rating of the Philadelphia Warehouse Company?

A. AA-1.

Mr. Podell: That is all.

Q. How many AAs?

A. The highest they have in the book.

Mr. Podell: That is all. That is our case.

Further recross-examination.

By Mr. Frank:

Q. May I ask one question: By that you mean on the sale of merchandise and notes, such notes were commercially considered as sure to be paid?

A. They were, and the credit back of them was supposed to be first class—assets and credits back of the note were represented as A-1.

Mr. Frank: That is all.

Mr. Podell: That is all. That is our case.

Plaintiff rests.

Mr. Frank: If your Honor please, the defendant moves to [fol. 234] dismiss on the ground that the plaintiff has not made out a cause of action, on the ground that the affirmative defense, as set out in the answer, has been affirmatively proved by the evidence introduced by the plaintiff.

The Court: Overruled.

Mr. Frank: Exception.

JOSEPH SEEMAN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

By Mr. Frank:

Q. Mr. Seeman, you are a member of the firm of Seeman Brothers, are you?

A. Yes, sir.

Q. And that firm has been engaged in the wholesale grocery business in New York for how long?

A. Since 1886.

Q. Have you personally been in the business since that time?

A. Yes, sir.

Q. And do you buy and sell wholesale groceries, including canned goods of various kinds?

A. We buy all kinds of groceries.

Q. Do you keep in touch with the market yourself?

A. Quite a bit.

Q. And market prices?

A. As much as possible.

Q. Have you ever had any business transactions personally with the Philadelphia Warehouse Company?

A. Never.

Q. Or any communications with them?

A. Never.

Q. I show you a letter or rather a copy of a letter addressed to your firm by the attorneys for the plaintiff, attached to the bill of particulars, bearing date March 15, [fol. 235] 1921 (handing paper to witness). Did you ever receive that letter or the original of it? That is a copy?

A. This is not written to us.

Q. Pardon me. I gave you the wrong letter. There it is—March 11, 1921 (handing paper to witness).

Mr. Frank: It is stipulated that we received that letter on or about the date it is dated.

The Witness: Yes, I remember we received a letter of this kind.

Q. Previous to that time—that is, to March 11, 1921—had you received any communication of any kind oral or

written, from the Philadelphia Warehouse Company or any one in its behalf?

A. No, sir.

Q. On or about February 27, do you know about a certain transaction of the purchase of canned salmon?

A. I am familiar with it, yes.

Q. And do you know the firm of A. J. Coccaro & Company?

A. What is that?

Q. Do you know the firm of A. J. Coccaro & Company?

A. I know of them now.

Q. At that time did you deal with them, your concern, directly or through a merchandise broker?

A. Through a broker.

Q. What was the name of that broker?

A. Alfred P. Martin, Incorporated.

Q. And how was your attention attracted to this particular quantity or lot of Blue Boy Salmon?

A. There was an Ad in the Journal of Commerce of February 17, 1920, put in by Alfred P. Martin, Inc., offering certain kinds of merchandise, and also offering pink salmon at \$1.65 a dozen.

Mr. Podell: I wonder, your Honor, how far we have to [fol. 236] go into this. I have not questioned that these gentlemen bought it and paid for it. The position we have taken in connection with that is that it does not make any difference. Why take up time with it?

Mr. Frank: I simply want to establish the fact and to show that we paid for it.

The Court: It is conceded that you bought and paid for it, and I suppose, in good faith.

Mr. Frank: All right.

Q. Were you familiar with the reasonable market price and value of salmon of that kind and quantity—that is, No. 1 Tall Blue Boy Alaska Pink Salmon in the months of February and March, 1919?

A. Yes.

Q. And was the price you paid for it the fair and reasonable market value?

A. Very close to the top market price.

Q. And what was the situation in the market for salmon

between—from the beginning of January, 1920, to the end of March, 1920?

A. The market had declined from January, 1920—steadily declined during the entire year.

Q. Did you at any time previous to paying for this merchandise, know that A. J. Coccarro or A. J. Coccarro & Company were in any way connected with the Yorke Storage & Warehouse Company?

A. No, sir.

Mr. Podell: Why defend yourselves against something that is not charged?

Mr. Frank: I am not defending ourselves. I do not want to argue with you.

Mr. Podell: I object, and move that the answer be stricken out.

The Court: Sustained.

Mr. Frank: Exception.

[fol. 237] Cross-examination.

By Mr. Podell:

Q. It was 999 cases, was it not, that you bought, Mr. Seeman?

A. I believe I bought 1,000.

Q. You bought 1,000?

A. Yes, but they only got 999.

Q. And that was Pink Salmon, No. 1 Tall?

A. Yes.

Q. And it came out of the Yorke Storage Warehouse?

A. I believe it did. I found that out afterwards.

Q. What did you sell that salmon for? You sold some of it in March, did you not?

A. Our records show that we sold some of that salmon about the end of April, until about the beginning of October—the best record we have now.

Q. What was the price it brought at the beginning of April?

A. We sold some at \$2.00, \$1.90, and then the market declined.

Mr. Podell: That is all.

Redirect examination.

By Mr. Frank:

Q. What quantities did you sell for \$1.90 and \$2.00?

A. We have a record here of 20 cases, 50 cases, 100 cases, 3 cases, 10 cases, 10 cases and so on, and 5 case lots, 4 cases, 10 cases, 20 cases—

Q. (Interposing.) That was considered practically the retail price?

Mr. Podell: I object to that.

Mr. Frank: Withdrawn.

Q. Was there a difference in the market price between large lots and small lots?

A. Well, a difference between a quantity of 1,000 cases and these small quantities, yes.

(Witness excused.)

[fol. 238] JOHN J. McANDREW, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Where do you live?

A. Newark, New Jersey.

Q. And in the year 1919 and the year 1920, by whom were you employed?

A. A. J. Coccaro & Company.

Q. And what was your particular business there?

A. I was in charge of the forwarding and insurance department, but at that particular time, in the summer and fall of 1919, I was the assistant to Mr. Coccaro.

Q. Assistant to Mr. Coccaro?

A. Yes.

Q. Now, I show you a paper, which has been marked in evidence here, dated November 8, 1919. Will you look at it, please, and tell me whether any part of that is in your handwriting (handing paper to witness)?

A. This is my signature on the bottom.

Mr. Podell: What is his signature?

Mr. Frank: The words "John J. McAndrew."

Q. Those words were written by you?

A. Yes, sir.

Q. And the rest of the typewriting and writing on that paper was not done by you, I take it?

A. No.

Q. Do you recall now, after looking at that paper, where you signed it, and under what circumstances you signed it?

A. I signed it in Philadelphia.

[fol. 239] Q. In whose office?

A. The Philadelphia Warehouse Company.

Q. And what happened at the time or immediately prior to the time that you signed that paper?

Mr. Podell: What paper?

Mr. Frank: I will have it marked. It is in evidence already, but in order to identify it, I will ask to have it marked separately now. It is marked Exhibit 41, I understand. I will have it marked as a separate exhibit now, however.

(Paper marked Defendants' Exhibit B.)

Q. At the time that you signed this paper in the office of the Philadelphia Warehouse Company, who was present besides yourself, if any one?

A. Who was present?

Q. Yes.

A. Well, to be frank, I cannot recall just who was present. There was only one man connected with the Philadelphia Warehouse Company that I knew personally, and that was Mr. Cosgrove, and he was not there at the time that I stepped into the office and got a check. That is what I signed for on that receipt.

Q. They gave you a check for how much? Are you able to tell us by looking at this exhibit (handing paper to witness)?

A. Well, according to the statement I signed, I must have received a check for \$15,833.33.

Q. You have just stated that the only person you knew of the Philadelphia Warehouse Company was Mr. Cosgrove. Was that the gentleman who was on the witness stand here before?

A. The gentleman at the other end of the table, yes.

Q. Are you able to tell us when you first saw Mr. Cosgrove?

A. I had seen Mr. Cosgrove in our office at periods from 1918, 1919 and in 1920.

[fol. 240] Q. How frequently was he in your office after the date of that paper—that is, on November 8, from that time until the month of May, 1920?

A. How many times?

Q. Yes, how frequently?

A. Well, during periods when we had transactions with him, he was in there quite frequently. At other times, when there were no notes maturing or any business, he probably would not stop in over once in ten days.

Q. Did you meet him at any other place except the office of A. J. Cocarro & Company?

A. Oh, yes.

Q. Where else?

A. The office of A. U. Surprenant & Company.

Q. Where was *was* that?

A. I think it was—it was on Broad Street, I think, No. 20 Broad Street.

Q. Now, about what was the first time that you had any conversation with him regard to business?

A. Prior to the first loan that we got—made with them on foodstuffs, I personally conversed with Mr. Cosgrove relative to a loan on foodstuff—

Q. Just please answer the question.

A. I was trying—

Q. (Interposing.) Just wait. As I understand from this bill of particulars, there were a series of transactions dated respectively November 8, November 12, November 18, December 31, and January 5. Did you have any conversation with Mr. Cosgrove with regard to any of those transactions?

A. Yes.

Q. When was the first time, as near as you can fit it by referring to any papers, that you had this talk?

A. The first time I spoke to Mr. Cosgrove was prior to the first loan that we obtained from him on foodstuff.

Q. Was it prior to the date which you can fix in your [fol. 241] mind when you went to Philadelphia?

A. It was prior to this date, for I can see from the documents here—rather, of the documents I have looked at—that it must have been prior to November 8.

Q. Will you look at the paper, please, and tell us if you can by looking at it, what date it was that you went to Philadelphia? Does that signature bear a date?

A. It bears a date here of November 8. Where I have signed it, it has a date upon there of the 8th, but what I do know—

Q. (Interposing.) Well, to the best of your recollection, was it on the 8th, then that you did go to Philadelphia?

A. It was either the 8th or the 9th. I think that the check that I received over there would give me a better idea, or rather—

Q. (Interposing.) Have you got that check? What is the amount of it? Will you read it to me from the paper, the amount of the check?

Mr. Podell: Was it our check?

Mr. Frank: I don't know.

The Witness: \$15,833.

Mr. Podell: It was not our check.

Q. Before you went to Philadelphia you had a talk with Mr. Cosgrove, did you?

A. Yes.

Q. And where was that talk?

A. In our office, at the office of A. J. Coccaro & Company.

Q. Who was present?

A. The first time I talked to Mr. Cosgrove I was only present.

Q. And how long was that before your Philadelphia trip?

A. How long?

Q. Yes.

A. Well, I don't know; I can not say.

Q. You can not recall the date?

A. No.

Q. Was it a matter of days or months?

A. Before this Philadelphia trip?

[fol. 242] Q. Yes.

A. What I want to say, I am trying to say it, but I don't know whether I am allowed to say—

Q. (Interposing.) You may have whatever data you want for fixing the dates.

A. I saw a bill of particulars. If I could see that.

Q. (Interposing.) Well, would that indicate to your mind about when these transactions took place (handing paper to witness)?

A. I would say that I met Mr. Cosgrove on November 5 or 6.

Q. And you say that was in the office of A. J. Coccaro & Company?

A. Yes.

Q. And was there a conversation then between Mr. Cosgrove and yourself?

A. Yes.

Q. What was that conversation?

Mr. Podell: I object to the conversation on the ground that it is an attempt to vary or modify written instruments.

The Court: He may answer.

Mr. Podell: Exception. I object on the ground that it is an attempt to modify written instruments, and is incompetent, irrelevant and immaterial, and not within the issues, not within the pleadings, and not binding upon the plaintiff. Your Honor will allow me an exception?

The Court: Yes.

Q. Please speak up, and answer the question.

A. I asked Mr. Cosgrove if he would be interested in making a loan on some foodstuffs that we had in a warehouse. As near as I can recall the exact conversation at that time, he told me that, as a general rule, they liked to loan their money on raw materials, but we discussed the [fol. 243] matter, and he said the probabilities were that he would make the loan, as it was more or less of a staple line.

Q. A staple line?

A. Yes, so then I asked him what would he charge me to make the loan. He told me that it would cost me, as near as I can remember—and I will be frank and tell you that I have looked over the books of A. J. Coccaro & Company recently, and have had my memory refreshed—

Mr. Podell (interposing): I move that that be stricken out.

The Court: Yes.

Mr. Frank: All right.

Q. You saw the books in the office of the trustee?

A. In the office of the receiver, Mr. Benjamin Lesser, 299 Broadway.

Q. After you had stated to him that you wanted this loan, what did he say?

A. He told me it would cost me one-quarter, one-half, and one per cent. I asked him did he mean a quarter of one per cent per annum, or per month, so he told me per month, so I asked him why he did not tell me the exact figure. He said, "Well, it is the method that we apply in our payments." He said, "We get one-quarter of one per cent, for our commission." He said, "We pay one-half or thereabouts, or whatever the money costs us," and he said, "The one per cent. you pay to A. U. Surprenant & Company." I asked him why I should pay A. U. Surprenant & Company, and he told me that that was the only way he could do business with me, would be through A. U. Surprenant & Company. I then told him that my reason for telephoning to him and getting in touch with him was to [fol. 244] avoid paying A. U. Surprenant & Company; that I knew that Coccaro in previous transactions made his loans through A. U. Surprenant & Company, and it was my duty, or rather my work at the time with Coccaro to try to obtain those loans as cheap as possible. Well, I said, "All right, because I have been instructed to get the money," and we needed money.

Mr. Podell: I move that that be stricken out.

The Court: Yes, strike it out.

Q. Won't you please tell us what you said to Mr. Cosgrove and what Cosgrove said to you?

A. I had in mind—I had with me a list or memorandum of all of the merchandise I wanted to obtain a loan on, and I gave him that list.

Q. When did you see Mr. Cosgrove again, after you gave him that list?

A. As near as I can recall, he investigated—

Q. (Interposing.) Never mind that. When did you see him again?

A. I think it was the morning of the day that I went to Philadelphia.

Q. What happened then?

A. He was in the office and he had the documents that it was necessary for us to sign.

Mr. Frank: Have you got those exhibits—exhibits as to the first loan of \$16,000?

Q. I show you a printed form—I show you three papers dated November 6, 1919 (handing papers to witness). Just take a look at those papers. Were those papers—did you see those papers before?

A. Have I seen those papers before?

Q. Yes.

A. I have seen similar papers. I don't know whether [fol. 245] I have seen those exact papers, but according to the system employed and the dates on here, those are supposed to be the papers that—

Q. (Interposing.) At any rate, did Mr. Cosgrove on the second occasion you saw him, produce any printed papers?

A. He had this form with him, and I know there were two or three signatures required.

Q. And were they signed in your presence by A. J. Coccaro & Company?

Mr. Podell: I object unless the papers are identified.

Mr. Frank: We are referring to papers which are in evidence, but not marked separately. They have been offered in evidence, but I would like to have that identified now particularly as the so-called pledge contract, dated November 8, 1919.

(Paper marked Defendants' Exhibit C.)

Mr. Frank: And the paper dated November 6 bearing, as the first printed words on it "Philadelphia Warehouse Company," signed A. J. Coccaro.

(Paper marked Defendants' Exhibit D.)

Q. When he produced those printed papers at that time, at the time of the second conversation, did Mr. Coccaro sign them?

A. I gave them to Mr. Coccaro and he signed them.

Q. Was anything said at that time?

A. Yes, we were anxious—

Mr. Podell (interposing): The same objection.

[fol. 246] The Court: Same ruling.

Mr. Podell: Exception.

Q. Go ahead.

A. I can answer?

Q. Yes.

A. We were—we discussed the matter of obtaining the money immediately, and as near as I can recall, Mr. Cosgrove called up the office of the Philadelphia Warehouse Company, and told them to obtain a check, that Mr. McAndrew, from the firm of A. J. Coccaro & Company, would be over after one o'clock and obtain it. As near as I can remember, I think I got an eleven o'clock train, for I knew that when I got there—

Q. (Interposing.) Was there anything said at that time or immediately prior to that time that those papers were signed, about the signature or about the contents?

A. I looked over the papers.

Q. Tell us what you said, as nearly as you can remember the words.

A. As near as I can remember it, I asked Mr. Cosgrove what was the idea of all those papers, and he told me that this was a form that was given to them by their attorneys, and the reason for doing it was to comply with the law.

Q. Now, after that did you meet Mr. Cosgrove on other occasions?

The Court: We will suspend here, gentlemen, until two o'clock.

Recess.

[fol. 247] JOHN J. McANDREW resumed the stand.

Direct examination continued.

By Mr. Frank:

Mr. Frank: What was the last question and answer, please?

(Record read.)

Q. Did you see Mr. Cosgrove after that?

A. Quite frequently.

Q. And where did you meet him after that?

A. In our office.

Q. Were you familiar personally with the other transactions that are referred to on the bill of particulars, Exhibit 40; that is, with the transactions of November 12, two on November 18, one on December 31, and one on January 5 (handing papers to witness)?

A. I personally assisted Mr. Coccoaro in most every transaction that we had at that time—that particular time, for I was the only one in the office that worked with him, and that he confided in and treated as his confidential man.

Q. I see.

A. That was myself.

Q. Were you present when these other various so-called pledge contracts and printed authorizations to S. B. Lewis & Company were signed?

A. I was present. I was present—whether in every instance or not, I can not state. I do recall that at least on one occasion I took some documents that had been left in the office by Mr. Cosgrove, Mr. Coccoaro not being there, and when Mr. Coccoaro returned, I had him sign them, and I took them over to the office of A. U. Surprenant, because I recall that Mr. Cosgrove had to make a stop there later in the day, and I was trying to save the time for him.

Q. You delivered them to Mr. Cosgrove at Surprenant's [fol. 248] office?

A. I should not say that. I could not remember whether Mr. Cosgrove was there when I got there, or whether I left them with Surprenant for Cosgrove when he arrived.

Q. Did you ever speak to Mr. Cosgrove in Surprenant's office at any time?

A. Did I?

Q. Yes.

A. There is one specific transaction that I can recall. My memory has been refreshed—

Mr. Podell (interposing): I move that that be stricken out.

The Court: Yes.

Q. Just answer the question, please.

A. What is it?

Mr. Frank: Will you read it, please?

(Question read.)

The Witness: Yes, sir.

Q. I call your attention to one of the exhibits in this case with regard to the transaction of \$36,000, in which the so-called pledge contract bears date December 31, 1919. Will you look at that, please (handing paper to witness)?

A. I can recall certain details in connection with it.

Q. I see. In connection with that transaction, did you go to Mr. Surprenant's office?

A. Yes, sir.

Q. And did you meet Mr. Cosgrove there?

A. Yes, sir.

Q. And by looking at that paper are you able to tell us whether it was before or after the date that that paper bears?

A. It was after it. It was after this date. If I could look at one of our ledgers, I could tell you.

Q. When you say "our ledgers," you mean ledgers of A. J. Coccaro & Company, which have been produced in court here by the trustee in bankruptcy, Mr. Lesser?

[fol. 249] A. Yes, I have looked at them. I have been over to the receiver's office.

Q. Is there any entry or item in these books that refreshes your recollection as to that transaction?

A. Yes, sir.

Q. With regard to the \$36,000 item?

A. Yes, sir.

Q. You looked at those books this morning, did you, that we have here?

A. No, I have not; I have not seen them.

Q. Are you able, without looking at those books, to give the jury the details of the transaction that you had, as you say, at Surprenant's office?

A. My memory was refreshed by looking at those books. There is an entry there on January 30—

The Court (interposing:): Is your memory now fresh, or do you need the books?

The Witness: Personally, I don't need the books.

The Court: Well, go ahead and tell us.

Q. Yes, just tell us what happened at Surprenant's office?

A. I answered a telephone call—

Mr. Podell (interposing:): Who was there, please? I object to any conversation had in the absence of this plain-

tiff, between this witness and anybody else, as not binding upon us.

Q. There was a telephone call?

A. Yes.

Q. And after you had it, did you go anywhere?

A. Mr. Surprenant, that was the man——

Q. (Interposing.) What did you do when you went there?

Mr. Podell (interposing). I object.

The Court: He may ask him what he did.

[fol. 250] Mr. Podell: Exception.

The Witness: Mr. Surprenant——

Q. You are not allowed to tell us what he said to you, but just tell us what you did?

A. I obtained a check for \$720, and I took the check over to the office of A. U. Surprenant——

Q. (Interposing.) Whose check was that?

A. It was a check of A. J. Coccoaro & Company. I cannot——

Mr. Podell (interposing): I move to strike that out as certainly not binding upon us. We don't know anything about these transactions that Coccoaro had, and in what way is this binding?

The Court: It may stand until I see what connection there is, if any.

Mr. Podell: Exception.

Q. What did you do with the check?

A. I went over and got the check——

Q. (Interposing.) What did you do with it?

A. I took either the check or cash over to the office of A. U. Surprenant & Company.

Q. What did you do with it?

A. I asked for Mr. Surprenant, and I was sent in to his private office. In his private office was Mr. Cosgrove, and I tendered either the cash or the check. My recollection is that it was a check.

Q. And that was how much after the date on which the \$36,000 transaction took place?

A. That was either on January 3rd or January 5th. I was censured at the time——

Mr. Podell (interposing): I move that that be stricken out.

The Court: Yes.

[fol. 251] Q. Just answer the question. The question that I ask you is, first, what did you do with that check or cash for \$720?

A. I gave it to Surprenant.

Q. And was anything said——

Mr. Podell (interposing): I move to strike that out as not binding upon us.

The Court: In the presence of Cosgrove?

The Witness: That was the commission of one per cent——

The Court (interposing): I did not ask you that. Just tell us what you did.

Q. You gave it to Mr. Surprenant?

A. To Mr. Surprenant.

Mr. Podell: I make the same motion.

The Court: Same ruling.

Mr. Podell: Exception.

Q. Was there anything said between you and Mr. Surprenant at that time as to what that check was for?

The Court: In the presence of Mr. Cosgrove?

The Witness: Yes.

Q. What was said?

The Court: In the presence of Cosgrove, was it?

Q. What was said?

A. Yes, he was present, Mr. Cosgrove. Mr Surprenant said, "Tell Coccaro for me that it was distinctly understood that in all those transactions this commission is to be paid before you receive the money."

Q. In this case was it paid before or after you received the money?

A. It was paid after.

[fol. 252] Q. Did you ever bring any other checks over to Mr. Surprenant?

A. Yes, I brought numerous checks over——

Mr. Podell (interposing): I move that that be stricken out.

The Court overruled.

Mr. Podell: Exception.

Q. Are you able, without reference to these books, to give us the date and amount of any other payment which you made to Mr. Surprenant with reference to any of these loans?

A. I would have to look at the book.

Q. Will you look at this book and see if it refreshes your recollection in any way as to any other check that you ever brought to Surprenant's office (handing book to witness)? You say it was on January 16. What did you do on January 16?

A. I made this payment on a \$5,700 loan.

Q. What was the amount, if any, that you brought to Surprenant's office?

A. \$114 on a \$5,700 loan.

Q. Do you recall, or does the entry refresh your recollection in any way, as to whether the amount of \$114 was in cash or by check?

A. No, it does not.

Q. That day——

A. (Interposing.) I don't even—I can't testify correctly whether that was an individual check, or whether that check was included in another check. We were paying him other commissions on other transactions.

Q. I see; and on what date was it, if you can tell by reference to the bill of particulars, that the Cocco Company received or made the arrangement for the \$5,700 transaction?

A. On January 5.

[fol. 253] Q. And was anything said at all to you by Mr. Surprenant or Mr. Cosgrove when you came in with that check?

A. On this particular transaction, as well as my memory can serve me, I don't recall seeing Mr. Cosgrove in the office of A. U. Surprenant when I brought over that payment.

Q. But with reference to what the checks were for?

A. Yes, at this one particular time that I recall on January 3rd, that check that I brought over for \$720——

Q. (Interposing.) What was that conversation? Was that the conversation you have already told the jury about?

A. Yes, that was the conversation I have already testified to.

Q. Are you able, without refreshing your recollection, to recall the times when you brought any other checks to Surprenant, or whether they had any reference to any of these other transactions?

A. I can recall that our instructions were that we had to make—

Mr. Podell (interposing): I move that that be stricken out.

The Court: Yes.

Q. From whom did you get these instructions?

A. From whom did I get these instructions?

Q. Yes.

A. From the arrangements that I made with Mr. Cosgrove at the inception of the transaction—

Mr. Podell (interposing): I move that that be stricken out as a conclusion.

The Court: Just read that.

(Answer read.)

The Court: It may stand.

Mr. Podell: Exception.

[fol. 254] Q. What had Mr. Cosgrove told you at the inception of the transactions?

Mr. Podell: I object to that as conversation that has already been gone over, and is in the record, and it has been answered.

The Court: If there is anything in addition to what you have already stated, you may testify to it. Otherwise, I think it has been gone over.

Mr. Podell: Exception.

The Witness: Mr. Cosgrove had me to distinctly understand that I would have to pay a one per cent. commission per month to Surprenant, and that would have to be paid before we would receive our check from that concern.

Mr. Frank: You may examine.

Cross-examination.

By Mr. Podell:

Q. Now, sir, you were the confidential man for Coccaro?

A. Yes, sir.

Q. And until what time did you hold that position?

A. Until I was taken sick——

Q. (Interposing.) I do not care anything about when you were taken sick. I ask you up to what time? Until what time?

A. Until February, 1920.

Q. February, 1920?

A. Yes.

Q. Then you left his employ?

A. No, sir, I had a disagreement with him.

Q. Well, did you leave his employ in February, 1920?

A. And I left his—I told him I was through, and I left the office, and that night I was taken sick, and I was home ill——

Mr. Podell (interposing): I move that that be stricken out as not responsive.

[fol. 255] The Court: Yes. Do not tell us the history of your life. Just answer the questions.

Q. Did you then leave his employ, February, 1920?

A. I did, but he sent for me.

Q. Did you come back again?

A. I did.

Q. When did you come back again?

A. Several days later.

Q. And did you resume your employment for him?

A. I did.

Q. And did you continue working for him?

A. I discontinued negotiating loans for him.

Q. Did you continue working for him after you returned?

A. I did.

Q. You did?

A. Yes.

Q. How long did you continue working for him after your return?

A. For about—up until the date of the bankruptcy.

Q. That was until May 27th?

A. So I understand.

Q. When did you stop being his confidential man?

A. During the month of February, 1920.

Q. That is the time you were no longer his confidential man?

A. That is the time when I refused to negotiate any further loans for him.

Q. And you thereupon ceased being his confidential man, did you?

A. That is correct.

Q. He would not take you into his confidence any more?

A. Well, I would not exactly say that.

Q. Then you were still in his confidence as to certain matters?

A. To a certain extent.

Q. Do you know who was the attorney for Mr. Coccoaro in those days?

A. Mr. Frank.

Q. The same gentleman who is defending Seeman Brothers here?

A. Yes.

[fol. 256] Q. The same gentleman that called you to the witness stand?

A. Yes, sir.

Q. The same gentleman who has called you to the witness stand in a previous case, is he not?

A. Yes.

Q. And you have testified also in a previous case?

A. I have testified in several cases.

Q. You have testified in several cases?

A. Yes.

Q. Now, tell me, sir, when did you first make the acquaintance of Surprenant?

A. When did I first make his acquaintance?

Q. Yes.

A. In August, 1919.

Q. That was before you ever spoke to Cosgrove, was it not?

A. Yes, sure.

Q. Who introduced you to Surprenant?

A. I was never introduced to him. I took documents over there to him.

Q. Who sent you to him?

A. Mr. Coccaro.

Q. You had not seen or met Cosgrove in your life then, had you?

A. Oh, yes.

Q. You had?

A. Yes, sir.

Q. Who was it that had introduced your firm of Coccaro to Surprenant?

The Court: You just said "Surprenant," and then you suddenly said "Cosgrove." Did you mean that?

Mr. Podell: I don't know, your Honor. May I ask that the question be read?

The Court: Yes.

(Record read.)

Mr. Podell: That is what I meant.

The Witness: That I don't know.

Q. That was one of the confidences that Mr. Coccaro did not take you in on, is that right?

[fol. 257] Mr. Frank: I object to that.

The Court: He may answer.

Mr. Frank: Exception.

Q. What is your answer?

A. Would you kindly read me that question?

(Question read.)

The Witness: That the time I know—I can recall this from my employment in the firm at the time that Mr. Surprenant and Mr. Cosgrove had business relations with Mr. Coccaro, I had not risen in the firm to a point where Mr. Coccaro confided in me.

Q. Do you know whether Surprenant and Cosgrove had business dealings with Coccaro before that?

A. Before the time that—

Q. (Interposing.) Before August of 1919?

A. Oh, yes.

Q. Do you know anything about those transactions?

A. No.

Q. Do you know whether it was Cosgrove that introduced Surprenant to Coccaro?

A. No, I do not.

Q. Do you know, as matter of fact, that Surprenant acted as your broker for several finance companies?

A. I know that—I never thought that Mr. Surprenant was our broker. We obtained money from him.

Q. I did not ask you what you did. Do you not know that it was through Surprenant that you got in touch with a number of people that were lending money to Coccaro?

A. I personally never thought Mr. Surprenant—

Q. (Interposing.) I did not ask you what you personally [fol. 258] thought. I asked you if you did not know a certain fact.

A. I did not know.

Q. You do not know it now?

A. Repeat that question, please.

Q. Do you not know now that on a number of occasions it was through Surprenant that you got in touch with a number of concerns that were lending either money or credit to Coccaro?

A. I do know—

Q. (Interposing.) That that is so?

A. I do know that we borrowed direct from Mr. Surprenant. Mr. Surprenant himself was supposed to negotiate the loans for us. As how he brought it about I personally—I personally don't know. I know there was numerous firms that would tender us various documents, that Coccaro would sign, and I personally would take them back to the office of A. U. Surprenant, accompanied with cash or checks.

Q. And you do not know who those other firms are?

A. Oh, yes.

Q. You do know them?

A. I know some of them.

Q. Well, who do you know, besides the Philadelphia Warehouse Company?

A. You mean loan companies in New York City?

Q. Yes, that did business in the way that you have described, with Coccaro?

A. Well, I personally did business with Levinson & Co.—

Q. (Interposing.) Through whom?

A. Through whom?

Q. Yes.

A. Direct.

Q. Did you not do it through Surprenant?

A. No, sir.

Q. Will you not tell us, please, the names of the firms that you know, besides the Philadelphia Warehouse Com-[fol. 259] pany that you got money or credit from through Surprenant, and paid Surprenant the commission for it?

A. I cannot tell you personally that I ever negotiated a loan. I never negotiated a loan.

Q. I did not ask you about negotiating. I asked you about the names of firms?

A. (Interposing.) There was the Industrial—I recall two firms—there was the Finance Trust and the Industrial Finance, I think, was the name of the two concerns.

Q. Did Cosgrove have anything to do with the transactions with the Finance Trust?

A. Cosgrove?

Q. Yes.

A. Not that I know of.

Q. Did Surprenant have anything to do with those transactions?

A. Yes.

Q. Now, what was the other concern you named?

A. The Industrial Finance and the Finance Corporation.

Q. Did Cosgrove or the Philadelphia Warehouse Company have anything to do with this concern you have just named, or the transactions with it?

A. Not that I know of.

Q. Did Surprenant have something to do with it?

A. Yes.

Q. Now, do you not know that long before November 5th or 6th when Cosgrove told you that you must pay Surprenant, that you had several transactions or your firm did, in which you had paid sums of money to Surprenant for getting you loans and getting you credit? Do you not know that?

A. That we paid Surprenant?

Q. Yes.

A. Yes, we had been paying Surprenant on food transactions since—well, I think the cars started to arrive here in August—cars of dried and canned fruit.

[fol. 260] Q. And what had you been paying him, how much per cent. had you been paying Surprenant?

A. Three per cent a month.

Q. Three per cent. a month?

A. Three per cent. a month.

Q. I am talking now about these bills prior to November 5th?

A. Prior to November 5th the contract that was drawn up between Mr. Coccoaro and Mr. Surprenant called for a payment to Surprenant of three per cent. a month on all bills that he—

Q. (Interposing.) Where is that contract?

A. I don't know.

Q. What has become of it?

A. I could not tell you.

Q. When was it signed?

A. It was executed in July or August, 1920.

Q. Did Cosgrove have anything in the world to do with that contract between Coccoaro and Surprenant?

A. Not in the least.

Q. You mean in August, 1919?

A. Yes.

Q. Now, sir, you were the confidential man for Coccoaro at that time, were you not?

A. More so than any one in the organization.

Q. And, of course, you knew about this contract with Surprenant?

A. I knew about it?

Q. Did you not?

A. Naturally I did.

Q. You knew its terms, did you not?

A. I can recall—

Q. (Interposing.) Just tell the Judge and jury what its terms were.

A. As near as I can recall, the contract was drawn up stipulating that upon the arrival of cars of merchandise from the Pacific Coast—we contracted for a great number of cars of dried and canned fruit; Mr. Coccoaro arranged [fol. 261] with A. U. Surprenant & Co., and I think that the contract was drawn with the International Credit Trust; that was a corporation whose offices were in the same office of A. U. Surprenant, and it called for a payment of three

per cent. Surprenant or the International Credit Trust were to pick up the drafts and the bills of lading. For that service Surprenant would receive three per cent. The assumption was that Coccaro would take it off his hands before thirty days. That was three per cent. for thirty days. He also received—

[fol. 261] Q. (Interposing.) Who was the "he"?

A. Surprenant or the International Credit Trust. I am just reciting what this contract contained.

Q. Yes.

A. They would also receive 33-1/3 per cent. of the profits on the sale of this dried and canned fruit. He would also receive interest at the rate of 6 per cent. per annum.

Q. Yes.

A. Also included in that contract was an assignment made by Mr. Coccaro to—I am almost certain now it was the International Credit Trust that the contract was between—his equity in merchandise shipments of candy or other merchandise that we had made within the previous three months, to England. Our invoices showed that we had an equity of \$60,000 to \$85,000 at that particular time, and in order to protect Surprenant, he made this assignment to him. That was also included in the contract, or an additional copy that was attached to the contract.

Q. How long was this contract to last?

A. That I cannot recall. As near as I can remember it was to last until all the orders or all the merchandise that we had contracted for in the spring, were received here, and either sold or delivered.

[fol. 262] Q. And that contract was made when?

A. In July or August, 1919. Mr. Coccaro—we did not have enough money in the bank at the time to take care of those purchases. A car would arrive here and the invoiced value on it would run anywhere from five to fifteen thousand dollars, depending on the merchandise. In August they started to arrive, sometimes one a day or two a day, and maybe ten, twelve or fifteen a week. Coccaro appreciated the fact that we did not have enough capital to finance it.

Q. Yes.

A. And he made arrangements then with the International Credit Trust through—

Q. (Interposing.) You do not claim that Mr. Cosgrove told you that you must make that contract with Surprenant, did he, and pay him three per cent. a month from July or August, 1919, do you?

A. During or at that time that I testified to——

Q. (Interposing.) You have testified about November 5th——

Mr. Frank (interposing): Let him answer.

Mr. Podell: I am entitled to an answer to my question.

Q. Is it your claim now that Cosgrove told you that you must make a contract—this contract in July or August—and pay Surprenant three per cent. for financing——

A. (Interposing.) In November—no, my suspicion was aroused——

Q. (Interposing.) I did not ask you anything about your suspicion. Had you spoken to Cosgrove before this contract was made in July or August?

A. You mean for the financing business?

Q. Yes.

A. No.

[fol. 263] Q. Did Cosgrove have anything to do with that contract you have described?

A. No.

Q. Can you tell the jury how long that financing was to last—the financing under the contract whereby Surprenant was to finance you, or the Credit Industrial, or whatever the name of the firm is?

A. As near as I can remember——

Q. (Interposing.) Give us the time. I am asking you for the time. How long?

A. How long did it last?

Q. How long was it to last?

A. Until the merchandise arrived here and was picked up and the drafts paid.

Q. Can you not give us an idea how long a period of time that was to last?

A. No.

Q. Well, how long did it last?

A. That I could not tell you. I was not in the food department.

Q. This is food—salmon?

A. Well, but I was not in the food department.

Q. Salmon is food, too, is it not?

A. Yes.

Q. You seem to know everything about the transaction with Cosgrove with regard to the salmon.

A. That was my specific duty. I was obtaining loans for Coccaro.

Q. Did not that contract that you have spoken of as having been entered into in July or August, whereby Surprenant was to Finance Coccaro—did not that have a definite period of time recited in its terms, in its body? Did it, yes or no?

A. How?

Q. Did it?

A. As near as I can remember the contract called for the lifting of drafts, the picking up of bills of lading.

Q. For how long a period of time?

A. Until all the cars that were contained in our contracts [fol. 264] that had been made by the Food Department in the spring—until they all either were delivered in New York City or advices received by us that they would not arrive.

Q. Can you say to this jury whether it lasted six months—the contract?

A. Well, I really believe that there were cars that did not get in here until January or February.

Q. January or February of 1920?

A. Yes.

Q. So that you are certain at least—

A. (Interposing.) No, I am not certain of that, because I was not in the Food Department. That is only from my recollection. If I could look at the books—

Q. (Interposing.) You can look at anything you want. If you will give me an answer to my question, look at anything you like. I want to know whether that contract lasted until January or February of 1920? Now, look at anything, you like, and give me your answer.

A. I might probably sit down there for a couple of hours and look in the Food Department records, and not be able to find the entries, because I had no interest—

Q. (Interposing.) I did not ask you for a speech.

Mr. Podell: If your Honor please, I have received word, a few moments ago, that I am expected in the Appellate

Division, and that I should be there no later than 3 o'clock. It is perfectly apparent that we cannot get through today.

The Court: Very well, we will suspend here until eleven o'clock on Monday morning.

Mr. Podell: Your Honor, we have subpoenaed Mr. Sur-[fol. 265] perant, and I would like to have the Court instruct him to appear here again on Monday morning.

The Court: Eleven o'clock Monday morning, Mr. Surperant.

Adjourned to Monday, November 12, 1923, at 11 A. M.

New York, November 12, 1923.

Mr. Frank: I will call a witness out of turn, with your Honor's permission. He wants to get away this afternoon. The Court all right.

ARCHIBALD C. CLARK, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. What is your name and address, please?

A. Archibald C. Clark.

Q. What concern are you connected with?

A. A. C. Clark Company.

Q. And what is your business?

A. We represent canning factories all over the country.

Q. And did you do business in New York City in the years 1919 and 1920?

A. Yes, sir.

Q. And were you familiar with the market prices of canned salmon at that time?

A. Yes, sir.

Q. What amount of business did you do at that time in this sort of goods?

A. In 1920 or 1921?

Q. Well, in 1920?

A. It is very hard to say. It is four years ago.

Q. Well, approximately what amount of business did you do?

A. We were selling all kinds of canned foods all the time. [fol. 266] Q. Well, what was the volume of business? Was it a large business or a small business?

A. We do a business of about five million a year.

Q. And you did a business of that character in 1920?

A. It was smaller then, but several million dollars.

Q. Were you familiar with the price in March—February and March of 1920 of the kind and type of salmon known as No. 1 Tall Blue Boy Salmon?

A. Well, what variety was it? Pink salmon?

Q. Yes.

A. Yes.

Q. Will you tell us what the market value or price of 1,000 case lot of that salmon would be in that period?

A. If you will let me tell it in my own way, I think I can.

Q. Yes; go ahead.

A. You see, in 1920 the market started to——

Mr. Podell: (Interposing.) I object to a general lecture on the subject.

The Court: Yes.

Q. Just give us the price, and then your explanation may come later.

A. The nominal market, I should say, was \$1.70, or \$1.75.

Mr. Podell: The nominal market?

The Witness: The general asking price was that, but so many people found themselves without money that they would take any offer.

Mr. Podell: I object to that, if your Honor please, and move that it be stricken out.

The Court: Yes.

Q. Just explain what you mean by "the nominal market." [fol. 267] Mr. Podell: I object to his explaining things that have been stricken from the record.

The Court: Yes.

Q. I spoke of March and April, 1920——

Mr. Podell (interposing): I object, your Honor.

Mr. Frank: Pardon me. February and March, I should have said.

The Witness: Well, I would say about \$1.70 ex warehouse, New York.

Mr. Frank: You may cross examine.

Cross-examination.

By Mr. Podell:

Q. Does the Journal of Commerce publish these quotations?

A. Yes, sir.

Q. Have you looked up those quotations for the month of February?

A. No.

Q. Are you accustomed to relying on quotations given by the Journal of Commerce?

A. No.

Q. Are they not actual reports of actual transactions?

A. Not exactly.

Q. Well, whether exactly or not, is not that what they purport to be,—transactions actually made?

A. They usually are within five or ten cents a dozen of the market.

Q. Do you happen to know that in February, 1920, the Journal of Commerce quoted the price of No. 1 Tall Pink Salmon at \$2.05?

A. No, I don't know that.

Q. The American Grocer likewise publishes quotations, does it not?

A. Yes.

Q. Did you look up any of those journals?

A. I did not.

[fol. 268] Q. What did you take this from?

A. Buyers' prices from other brokers.

Q. You went to the books of other brokers?

A. Of other buyers.

Q. At that time?

A. Yes.

Q. Buyers from whom?

A. Well, I have it here.

Q. But buyers from whom? From manufacturers, canners, or from wholesalers, or jobbers or retailers or what?

A. Brokers that had goods in a warehouse, or merchandise—handlers of canned foods.

Q. And where were those sales made, those that you have looked up?

A. Here in New York.

Q. And how many brokers did you look up?

A. I didn't go to any brokers. I went to two buyers,—wholesale grocers.

Q. And that is what you base your testimony on?

A. Exactly.

Q. Does not your concern have records of that period?

A. We do, but we didn't make any sales in that time—February and March. I tried to find the records, but we made no sales in those two months.

Q. Then, you do not base your testimony on any records of sales made by your own concern?

A. No, we made none.

Q. But you base your testimony on information that you found or obtained from two buyers?

A. They went over their records, and showed me where they had purchased.

Q. I did not ask you that. They went over their records, did they?

A. They did.

Q. Those two brokers?

A. No, wholesale grocery buyers.

[fol. 269] Q. Was one of them Seeman Brothers, by any chance?

A. One was R. C. Williams & Company, and the other was Austin, Nichols & Company.

Q. And is that as far as you went in your investigation?

A. Yes, sir.

Mr. Podell: That is all.

Redirect examination.

By Mr. Frank:

Q. Would the fact that there was a quotation in the Journal of Commerce alter your opinion that you have given here in any way?

A. None whatever.

Q. And what was done in the trade with reference to

quotations in the Journal of Commerce? Were they commonly accepted as values?

A. I don't understand you.

Q. Were quotations in this Journal of Commerce accepted as fixing or setting values?

A. They would not, with me. I never pay any attention to those quotations, because they are usually wrong.

Q. Was there any demand for salmon of this kind in February and March, 1920?

A. Very little, because all the buyers knew that the market was declining.

Mr. Podell: I move that that be stricken out as purely a conclusion.

The Court: Let me hear that.

(Answer read.)

The Court: It will be stricken out.

Mr. Frank: May "very little" stand, your Honor?

The Court: Yes.

Recross-examination.

By Mr. Podell:

Q. Did you not tell us a moment ago that the Journal of [fol. 270] Commerce was about five cents away from the market?

A. Sometimes they are. You don't understand——

Q. (Interposing.) Please, don't lecture me.

A. I will modify my statement.

Q. You want to modify your statement?

A. Sometimes they are five cents out of the way; sometimes as much as twenty cents a dozen out of the way.

Mr. Podell: I move that the answer be stricken out as not responsive to my question.

The Court: No, it may stand.

Q. You modify your previous statement, do you? The statement that you made before was that they were within five cents of the market, as a general thing.

A. Sometimes they are, and sometimes it is more than that.

Q. But you did not look into the quotation further than you have stated?

A. I did not consider it necessary.

Q. I did not ask you whether you considered it necessary.

A. No, I know you did not.

Mr. Podell: I move that that be stricken out.

The Court: Yes. Just answer the questions.

The Witness: What was the question, again?

Q. Did you look any further for some basis for market values as of that time, than asking information of those two buyers?

A. I went to these two buyers——

[fol. 271] Q. (Interposing.) Did you look any farther than that?

A. No, I did not.

Mr. Podell: That is all.

Mr. Frank: That is all.

(Witness excused.)

New York, November 12, 1923.

JOHN J. McANDREW resumed the stand.

Cross-examination.

Continued by Mr. Podell:

Q. Since last Friday, have you looked up the books so that you are able to say how long that contract with Surprenant was to last?

A. I have looked at the books.

Q. And can you tell us how long it was to last?

A. I don't know.

Q. How long did it last as matter of fact?

A. That I don't know.

Q. Did you not find some indication in your books?

A. The records are incomplete——

Q. (Interposing.) Did you find any indication in your books as to how long it lasted?

A. No, sir.

Q. Now, maybe we can help you out.

Mr. Podell: Let me have Surprenant's contract.

Q. Did not this contract last—did not this contract have a provision that Mr. Coccoaro was to divide his profits with Mr. Surprenant?

A. I did not have anything to do with the contract, and I don't know exactly what was contained in the contract.

Q. Now, your statement is that you had nothing to do with the contract?

A. No, I told you the other day that I had nothing to do [fol. 272] with it—with the drawing up of that contract.

Q. Did you not, as matter of fact, give us or purport to give us the terms of that contract?

A. I told you what I knew, or what was generally understood in the office—what that contract contained.

Q. Now, do you not know that that contract contained a provision that Surprenant was to get 33-1/3 per cent. of the profits of Coccoaro?

A. I told you that I thought that that was one of the terms of the contract, that he was to receive a percentage of the profits.

Q. Did you not as matter of fact say—do you not know that the percentage was to be one-third?

A. To the best of my recollection.

Q. Did you not say in so many words on Friday that they would also receive 33 1/3 per cent. of the profits on the sale of this dried and canned fruit?

A. Yes, sir.

Q. You did not discuss that one-third of the profits with Cosgrove at any time, did you?

A. No, sir.

Q. You do not claim that Cosgrove ever told you he wanted any part of the profits of your business?

A. No, sir.

Q. Now, did you not as matter of fact bring numerous checks from time to time to Surprenant?

A. Yes, sir.

Q. Both for profits and this three per cent. commission per month?

A. No, sir, I never knew of taking a check to him relative to any commission—rather, any part of the profits.

Q. You do not know anything about that?

A. As near as I can recall, there was another account [fol. 273] kept that I didn't know anything about. The checks were not drawn in our office.

Q. Another account by whom?

A. In the office of Surprenant & Company.

Q. You mean an account relating to his proportion of the profits?

A. An account relating to that contract.

Q. To that contract made in July or August?

A. The contract—yes, in July or August.

Q. And you knew nothing about that arrangement with Surprenant—that other account with Surprenant?

A. Mr. Coccoaro would tell me certain things, and other things he would not tell me.

Q. Did you have anything to do with the keeping of his books?

A. Any matters that I handled for him, where a payment had to be made, I would have to O. K. a slip and tender it into the bookkeeping department, before they would sign the check for me, and draw the check for me.

Q. Then, the items that would go into that check would be items that you would be familiar with?

A. No; items I would receive a memorandum from Mr. Coccoaro, when he would tell me to have certain checks drawn up, which he would O. K. the slips, and I would check them, and he would tell me how I should dispose of the checks.

Q. I show you an entry in the books of Coccoaro, headed "A. U. Surprenant & Company" (indicating) and ask you whether you recognized that as Surprenant's account with Coccoaro?

A. Yes.

Q. This account appears to begin with October 30, 1919. Was there an earlier record of an account between him and Coccoaro?

A. To the best of my recollection, there was.

Q. I show you another account headed "International [fol. 274] Credit Trust" in another book, and ask you whether that relates likewise to the Surprenant transactions?

A. Yes, sir.

Q. Between Coccoaro and Surprenant?

A. And the International Credit Trust.

Q. Now, will you find anywhere in this account of Surprenant's the payment for the check of \$720 that you speak of?

A. This is not the ledger that I looked up before. There is another ledger.

Mr. Frank: Show him the ledger.

The Witness: That is not the ledger that I looked at.

Q. I show you another book and ask you whether that is a continuation of the account first shown you between Surprenant and Coccoaro (handing book to witness)?

A. I don't know whether it is a continuation or not but I know that this is the account relating to Surprenant.

Q. What date does it begin with?

A. This book begins with January 3, 1920.

Q. Now, where is the item for \$720?

A. The first entry in the book dated January 3rd, it reads two per cent commission on \$36,000 loan, Philadelphia Warehouse, cash book 34, \$720.

Q. Let me see it, please?

A. (Handing.)

Q. To whose order was that check?

A. I cannot recall whether the check was drawn to the order of A. U. Surprenant, or whether it was drawn to the order of cash, and I went to the bank and got the cash; but I do recall that I O. K.'d the slip, received the check. Whether I took the check and it was drawn to A. U. Surprenant, or whether I took a cash check, and went to the Irving Bank and got the cash, I do know that I delivered either one, either the check or the cash over to the office of A. U. Surprenant.

[fol. 275] Mr. Frank: We have subpoenaed the trustee in bankruptcy here, Mr. Lesser, merely to say that he produced all the books and papers——

Mr. Podell (interposing): I object to these interruptions.

The Court: No, if he is a lawyer and is just going to be asked one question——

Mr. Podell: Very well.

(Witness temporarily excused.)

BENJAMIN LESSER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Mr. Lesser, you are the trustee in bankruptcy of A. J. Coccaro & Co.?

A. Yes, I am.

Q. And, pursuant to subpoena, you have produced here many books and papers of A. J. Coccaro & Co.?

A. I have.

Q. Did you produce all the books and papers that are in your possession, or are there some of them that you have not produced?

A. I produced all that are in my possession now.

Q. Were any of the papers destroyed?

A. There were a number of papers—a truckload—taken to the warehouse, and I kept them there for about two years, and then we drew them out, and these were the books of account—the current books of account and records, and those I took to my office, and I have produced them all here today.

Q. Now, referring sepecifically to returned checks or vouchers on various banks—that is what I am referring to [fol. 276] particularly.

A. Well, you have here everything that I have in my possession.

Q. Were any of those returned vouchers, to your knowl-

A. I cannot produce them, I would say there were none in edge, destroyed or are they where you cannot produce them? the warehouse.

Q. You produced all you were able to find?

A. I produce everything I have in my possession now or have had within the previous year.

Q. You were subpoenaed specifically to produce a check drawn on the Irving National Bank for \$720 on January 2, 1920. Have you been able to produce the original?

A. No, sir.

Q. Do you know where that is?

A. No, sir.

Cross-examination.

By Mr. Podell:

Q. Mr. Lesser, who represented Coccoaro in the bankruptcy proceedings?

A. Mr. Frank.

Q. Who represented him in the criminal proceedings?

A. I don't know. I had nothing to do with that.

Q. You had nothing to do with that?

A. No.

Q. You do not know, you say, whether any of those papers are still at the warehouse?

A. I know they are not there.

Q. You know they are not there?

A. Yes.

Q. Did Mr. Frank at all times during the proceedings have access to those books and papers?

A. Yes, everybody did. The Yorke Warehouse was one of the assets of this case, and we continued the warehouse, and when I was appointed receiver—I was receiver in the matter—we took a truckload of papers and records. I think there were—there was a truckload—I don't know how many cases—and we put all those papers in there, put them [fol. 277] in our warehouse, and we kept them there for almost two years, and then when we gave up the warehouse, we destroyed them—told them to send them away, that we did not have any further use for them.

Mr. Podell: All right.

The Witness: That is, except the books that I have produced here to-day.

Redirect examination.

By Mr. Frank:

Q. The statement was made here that I had access to those papers. Do you mean to insinuate that I took any of them?

A. No, I did not say that. I mean that any one who asked me to look at the books or records in the warehouse I gave them an order to go there and see what they wanted.

Mr. Podell: I did not mean to imply that you took any of the papers. You need not be offended.

Q. So far as you know, you never gave me any order to go there, did you?

A. I don't think I did.

Q. On several occasions I have asked you to assist me in finding that check of \$720, have I not?

A. You have.

Q. And you have not been able to find it?

A. I have not.

Recross-examination.

By Mr. Podell:

Q. As matter of fact, you do not know whether there ever was a check for \$720?

A. I have no information on that at all.

(Witness excused.)

[fol. 278]

New York, November 12, 1923.

JOHN J. McANDREW resumed the stand.

Cross-examination continued.

By Mr. Podell:

Q. Now, Mr. McAndrew, when you had this slip that you say you O. K.'d, with the items to be paid, do you know what I refer to?

A. Yes.

Q. Did you frequently have more than one item on it?

A. On the slip?

Q. Yes.

A. Well, if I would draw up the slip myself, it would all depend on the number of checks I would have to have made out.

Q. Suppose it was going to one person, like Surprenant, and you had several items, would you make out separate checks?

A. If I personally handled the transaction with him, I would cover them all on one slip.

Q. And then you would draw one check for the total that was due to that one person?

A. Provided that it covered the same transactions, or were entered along the same lines.

Q. Whose handwriting is this page in (indicating)? What is this book?

A. One of our ledgers.

Q. Is that all you can say about it—just one of your ledgers?

A. Well, that is all I can say, yes.

Q. What kind of ledger was it?

A. If you will allow me to look at it, I might be able to answer the question.

Q. Surely, look at it, of course.

A. It was one of our ledgers, showing cash—check disbursements.

Q. Showing what checks were issued, is that right?

A. It was one of the books that will show.

Q. Will show what checks were issued?

A. Yes.

[fol. 279] Q. Now, look at this list, pointing to item headed January 12, 1920. Is that one check that was issued, \$632.61?

A. I personally could not tell you whether that was one check or not.

Q. You could not?

A. Oh, no; my memory is not that good.

Q. What about these several items to Surprenant?

A. I don't know what they refer to. There is not enough information on here for me.

Q. I see. Now, look at these items (indicating).

Mr. Frank: I do not know what you are talking about.

Mr. Podell: You will know in a moment.

Q. Referring to items headed January 5, 1920, it will be noticed there commission and interest, food department, to A. U. Surprenant, \$720?

A. Yes, sir.

Q. Is that the same \$720 that you were talking about?

A. This entry here (indicating)?

Q. Yes.

A. One for \$720.

Q. Is that the same item that you have been talking about a few moments ago?

A. Well, the only difference is that this ledger is dated January 5, 1920, and the other ledger has a date of January 3rd.

Q. I do not care so much about the dates of the two, but is it the same item?

A. Well, that I don't know.

Q. Do you not know that the item below says—

Mr. Frank (interposing): I object to counsel reading the item in evidence. The witness says that he does not know.

The Court: Yes.

Mr. Podell: I offer the item in evidence.

[fol. 280] Mr. Frank: I object unless I have the same right.

Mr. Podell: I have not limited you, but I do not want to make any general bargains.

Mr. Frank: I object to it as incompetent, irrelevant and immaterial.

The Court: It may go in.

Mr. Podell: Items under the stamp of January 5, 1920, reading as follows: "Commission and Interest, Food Department, to A. U. Surprenant," then comes a series of items, and I will read it exactly as it appears here: "One half on thirty-six"—

Mr. Frank (interposing): I submit that the jury should see the original exhibit, and not have it read into the record.

The Court: It may be read into the record later anyhow.

Mr. Podell: Half on \$36,720, half on \$6,060, \$7,564, \$75.64, \$14,451, \$72.25, 1/5 on \$2,053.96. The items appear in fractional numbers. I am told that "1/5" means January 5.

Mr. Frank: I object.

Mr. Podell: All right. 1/5 on \$2,053.96, \$51.77; 1/5 on \$7,620, and then in brackets \$9,900, \$175.20, 1/5 on \$5,059, and the total of those items footed is \$1,213.86. The items I just read are headed January 5, 1920, commission and interest, Food Department, to A. U. Surprenant.

(Marked Plaintiff's Exhibit No. 49.)

Q. The item of \$720 there represents two per cent. of \$36,000, does it not?

A. That represents one per cent. on a 30-day basis; that would be two per cent. for 60 days. The loan was for 60 days.

[fol. 281] Q. The loan was made for how long?

A. 60 days.

Q. And you gave Surprenant two per cent. of \$36,000, is that right?

A. Yes, sir.

Q. 720?

A. Yes, sir.

Q. And then you gave him on \$6,000—do you know whether that was a loan from the Philadelphia Warehouse, or who it was from?

A. I don't know.

Q. You know that there was no such loan made by any Philadelphia Warehouse at that time?

A. I don't know of any loan.

Q. Is there any book or paper or document of any kind that would refresh your recollection so that you could tell us what that \$6,000 item is?

A. I didn't have anything to do with that.

Q. Well, did you have to do only with the Cosgrove loans?

A. Only with matters that I started myself.

Q. Well, did you have to do with any loans from any other sources than the Philadelphia Warehouse Company?

A. Oh, yes.

Q. You did?

A. Yes.

Q. Is there not some way that you can tell us whether this \$6,000 was borrowed from another source?

A. You mean with A. U. Surprenant?

Q. Yes.

A. Cosgrove was the only loans that I ever negotiated that Surprenant was interested in.

Q. Let us get that straight. Your statement is that the only loans that you know anything about that went through Surprenant's hands are the loans of the Philadelphia Warehouse Company?

A. No.

Mr. Frank: I object to that. He did not say that at all.

[fol. 282] Q. Are the only loans that you had anything to do with the loans that went through Surprenant from the Philadelphia Warehouse Company?

A. No, I had other loans. The loans that I made with Mr. Cosgrove are the only loans that I ever made that Surprenant had any connection with. The other loans I made either direct or with someone else.

Q. You know Surprenant had connection with other loans made from other concerns by Coccaro?

A. I do know, but I did not handle them.

Q. You do not remember anything about them? You did did not have anything to do with them?

A. Other than acting as Mr. Coccaro's messenger.

Q. You know nothing, then, about the financing of these loans that were negotiated through Surprenant?

A. I do know that loans were made, and I took checks over there, but I made no arrangements.

Q. Is it not a fact that all you ever did was in connection with the Philadelphia Warehouse Company?

A. What is that?

Q. Just acting as messenger for Coccaro?

A. No, sir.

Q. It is true of every loan that went through Surprenant, but it is not true of the Philadelphia Warehouse Company?

A. That is correct.

Q. Now, tell us, please, whether you gave Surprenant one check for \$1,213.86 on January 5, 1920?

A. I cannot recall. I might have given him this check that you refer to.

Q. Now, then, since you might have done that, what did you mean by telling the Court and jury that you remembered distinctly bringing a check for \$720 to Surprenant?

A. I do.

[fol. 283] Q. Well, both statements cannot be true, can they?

A. Not if that book is correct, and if that one check—if that one check is the same check.

Q. Is there anything about this item that shows that the book is incorrect?

A. Well, there is nothing in the book that would tell me that that was all one check.

Q. But you said it might have been one check?

A. It might have been one check, yes.

Q. And if it was one check, it included the \$720, did it not?

A. I would say that.

Q. And yet you remember positively a separate check for \$720 for that transaction?

A. Yes.

Q. Now, you realize that both of those statements cannot be true?

Mr. Frank: I submit that is calling for a characterization by the witness.

The Court: Yes.

Mr. Podell: This is cross examination, your Honor.

The Court: Yes. You can get all the facts on cross examination, but that last question is objectionable.

Mr. Podell: It is his own testimony, not someone else's.

The Court: All right.

Q. I ask you whether both of those statements could be in accord with the facts, as you remember them; that is to say, the one that you remember positively a separate check for \$720, and the other that there might have been a check for \$1,213.86 including that item?

Mr. Frank: I object to that as purely argumentative. [fol. 284] The Court: Yes.

Mr. Frank: And asking for a characterization.

The Court: Yes.

Mr. Podell: I except.

Q. There is no doubt in your mind that this \$720 here is the same item that you testified about, is there?

A. I believe that that is the same item that is in the other book.

Q. That you testified about?

A. Yes, sir.

Q. That you said Cosgrove was there at the time you brought the check down?

A. Yes, sir.

Q. And that you said you were told by Surprenant at the time that these checks must be brought before you received the moneys?

A. Yes, sir.

Q. And not after?

A. Yes, sir.

Q. That is the time?

A. Yes, sir.

Q. You remember that very distinctly?

A. Yes.

Q. And yet you cannot say whether that item was included in a check of \$1,213.86?

A. I personally don't believe that that check was in—that check there in that book of \$720 was included in the \$1,213.

Q. You mean it was not given in one check?

A. No, sir.

Q. Now, that I have called these facts to your attention, you withdraw the statement that it might have been one check?

Mr. Frank: I object to that. He never said that.

The Court: That what might have been one check? The 700 or the 720, or the 720 included in the 1,213?

Mr. Podell: The total. It might have been one check. [fol. 285] Q. Did you not say here in the presence of the Court and jury that you might have given this man one check, but you could not remember?

A. Yes, I said I might have given him one check.

Q. And that you cannot remember whether it was one, or whether they were separate checks, did you not say that?

A. I can remember that I gave him one check, or the cash, for \$720. That I do remember, as I stated before, and it was either on January 3rd or January 5th.

Q. Is there any other book or paper which would help you to refresh your recollection, so that you could tell us whether that check of \$720 was included in the \$1,213.86 in the form of one check?

A. No, sir.

Q. And without the aid of any further data, you say you cannot remember that?

A. Yes, sir.

Mr. Podell: Now, I offer in evidence the account of A. U. Surprenant, as it appears in all of the books of Coccaro and likewise the account of the International Credit Trust, as the same appears in the books of Coccaro.

Mr. Frank: I do not quite know what is being offered in evidence, but I will state this, in order to have no dispute about it; I have no objection to any item in any of the books of Coccaro being read in evidence by either side.

Mr. Podell: First, I offer the account of the International Credit Trust.

(Marked Plaintiff's Exhibit No. 50.)

Q. Now, so we will be entirely clear about it I believe you stated to the jury that you understood at least that this [fol. 286] International Credit Trust was Surprenant's concern or company?

A. It occupied the same offices.

Q. The same offices?

A. Yes.

(Mr. Podell read to the jury Plaintiff's Exhibit No. 50.)

Mr. Podell: Now, I offer in evidence the Surprenant account.

(Pages marked respectively Plaintiff's Exhibits Nos. 51 and 52.)

Mr. Podell: This is Surprenant's account in Coccaro's books.

Q. Now, Mr. McAndrew, will you tell us, please, what are these various items that appear in the column on the left side of this page (handing book to witness)—the Surprenant account?

A. Interest and commissions.

Q. Paid to whom?

A. Presumably to A. U. Surprenant.

Q. Is there any question about that in your mind? You say "presumably"?

A. Well, according to the books, they were paid to him.

Q. Yes. And what are the entries on the right side of the same page?

A. They look like a continuation of the same account.

Q. And are they likewise payments to Surprenant?

A. Yes, sir.

Q. Now, do you not know that there was a special account in the bank called the A. J. Coccaro Special?

A. I do not recall there was such an account.

Q. Do you not know that Surprenant signed checks on that account as attorney for Coccaro?

A. That I don't know. I did understand such was the arrangement.

[fol. 287] Q. You did understand that such was the arrangement?

A. Yes, sir, but I personally—

(Q. Interposing.) You had no knowledge of it at all?

A. I personally never had anything to do with that account.

Q. You never signed a check, or you have never seen a check signed that way, have you?

A. No, sir.

Q. And so you simply repeat what you heard, sort of vaguely, about the thing in the office of Coccoaro, is that it?

A. Oh, I knew that for a positive fact there was such an account, but it was none of my business.

Q. About that you were not taken into Coccoaro's confidence?

A. Mr. Coccoaro did not tell me about that.

Q. I see.

A. I got that information from the bookkeeping department.

Q. And do you recall how long that special account lasted, on which Mr. Surprenant signed checks for Mr. Coccoaro?

A. No, sir.

Q. Do you know how much of the moneys of Mr. Coccoaro Mr. Surprenant signed away that way?

A. I don't know.

Q. Did Cosgrove ever talk to you about opening an account—a special account, and having Mr. Surprenant sign checks for Coccoaro?

A. No, sir.

Q. Did Cosgrove, to your knowledge, have anything on earth to do with any such special account?

A. No, sir.

Q. Can you say whether that special account was in existence in the month of February, 1920?

A. I could not state whether it was or not.

Q. Look at this check and please tell us whether it was [fol. 287] or was not (exhibiting paper)?

Mr. Frank: If the check is what is going to prove it, let the check be offered in evidence.

Mr. Podell: Maybe it will be, if you will just be a little bit patient.

Mr. Frank: I object to the question.

Mr. Podell: I show him a paper and ask him to refresh his recollection.

The Court: He may refresh his recollection from it.

The Witness: According to the check dated February 26, I presume it was in existence at that time.

Mr. Podell: Now, to accommodate Mr. Frank, we will have it marked in evidence.

Mr. Frank: No objection at all.

(Paper marked Plaintiff's Exhibit 53.)

Q. Was this before you stopped being a confidential man—February 26—before you were turned out of the confidence of Mr. Coccaro, or after?

A. I am not certain about the date. I think it was afterwards.

Q. Afterwards?

A. Yes, sir.

Q. You were in his confidence before that, but not after?

A. To the best of my recollection, it was prior to the date of that check when I had a disagreement with him.

Q. And all confidential relations ceased?

A. No, not all confidential relations ceased. He did not consult with me as much as he did formerly.

Q. Now, as matter of fact, Mr. McAndrew, there were a great many financial transactions between Surprenant and Coccaro that you knew nothing about?

A. Yes, sir.

Q. And what arrangements or relations they had be-
[fol. 289] tween themselves, you are in no position to state of your knowledge, except so far as you have told us about the contract that you have described?

A. Yes, sir.

Q. Is that right?

A. That is right.

Redirect examination.

By Mr. Frank:

Q. Would you be able to refresh your recollection as to whether or not you brought the check or the cash over to Mr. Surprenant, by looking at Coccaro's account in the Irving National Bank?

A. Yes, sir.

Mr. Frank: Is the Irving National Bank here?

A. Voice: Yes.

Q. Now, this check which has been shown to you by counsel is drawn on the Bronx National Bank, is that right?

A. Yes, sir.

Q. And that account you never had anything to do with?

A. No.

Q. You know he did have an account in the Irving National Bank?

Mr. Podell: Who is testifying?

Mr. Frank: All right.

Q. Did you know whether or not Coccoaro had an account in the Irving National Bank?

A. Yes, sir.

Q. The Irving National Bank has produced a transcript. Will you look at that and see whether that refreshes your recollection as to where you got the check for \$720 on the 3rd or 5th? Look at the transcript there.

Mr. Frank: Just call his attention to it there, please.

[fol. 290] (Whereupon, a man from the court room came up to the witness stand and pointed out something to the witness on a paper in his hand.)

The Witness: I can see from this that it was a check on the Irving Bank for \$720.

Q. Do you see any check on that day on the Irving Bank for an amount totalling \$1,213.86 or at any date near that?

A. There is no such check.

Q. I see. All right. Now, Mr. McAndrew, you testified here that there was an agreeemnt of some kind in writing between Mr. Surprenant and Mr. Coccoaro. Were you present when that agreement was drawn?

A. No, sir.

Q. Do you know whether it was drawn in a lawyer's office?

A. I do know of an agreement being drawn in a lawyer's office, yes.

Q. And what was the name of the lawyer?

A. It was the law firm of Leo Oppenheimer & Company.

Q. Did Coccoaro pay them for drawing it?

A. Yes, sir.

Q. You testified here in answer to some question, that I represented Mr. Coccoaro previous to May, 1920. Will you state to the jury the nature of the work I did for Mr. Coccoaro at that time?

Mr. Podell: Your Honor, how can he state the nature of the work that he did for Mr. Coccoaro at that time?

Mr. Frank: If you know.

Mr. Podell: I object to it, your Honor.

The Court: He may answer.

The Witness: Well, I can recall I was in charge of the forwarding and insurance——

[fol. 291] Q. (Interposing.) Just answer the question. What work——

A. (Interposing.) The trial of cases.

Q. Just explain to the jury, please, what work I did as such attorney, if you know?

A. Well, you tried some cases for us—insurance cases.

Q. So far as you know, was that agreement that you referred to, drawn by me?

A. It was not.

Q. Or was it ever referred to me in any way?

A. No, sir.

Q. Or was I ever consulted in any way with regard to it?

A. No, sir.

Mr. Podell: I object to that. How can he know what A. J. Coccoaro did?

The Court: Let me have the last question.

(Question and answer read.)

Q. So far as you know.

The Court: So far as he knows, he may answer.

The Witness: No, sir.

Q. Now, Mr. McAndrew, I call your attention to one of the books of Mr. Coccoaro marked Book No. 7, on page 8, to the item of \$114, and the entry, commission \$5,700 at two per cent., interest and commission to A. U. Surprenant, dated January 16. Was that the item which you have testified to?

A. Yes, sir.

Q. And was that another one of the items where you went over and took a check or the cash to Mr. Surprenant?

A. Yes, sir.

Mr. Frank: That is all.

[fol. 292] Recross-examination.

By Mr. Podell:

Q. Have you been able to locate the cash book of Coecaro & Company?

A. No, sir.

Q. You have some petty cash book, have you not?

A. I saw in the receiver's office some petty cash book covering disbursements in the Custom House and the forwarding department.

Q. That is all it would cover?

A. Yes.

Q. Disbursements in the Custom House and forwarding department?

A. Yes, sir.

Q. Is it not a fact that all that you remember you ever did was to take charge of his forwarding and his insurance?

A. No, sir.

Q. You wrote, all told, how many letters to Cosgrove, do you know—to the Philadelphia Warehouse Company?

A. Well, that I do not know. If I would dictate the letter, I would sign it.

Q. Do you not know that all your letters have reference to nothing more than either shipping or insurance?

A. Well, that was the only department that I was in charge of at that time.

Mr. Podell: That is all.

Mr. Frank: That is all.

Mr. Podell: Oh, I want to ask him just one question.

By Mr. Podell:

Q. Does not this item of January 5, 1920, refresh your recollection so that you can say that the check for \$720 was to the order of A. U. Surprenant (handing paper to witness)?

A. It can be marked there. It could have been a cash check.

Q. It was either a cash check or was to the order of A. U. Surprenant?

A. Yes.

Q. Is that right?

A. Yes.

(Witness excused.)

[fol. 293] STANLEIGH C. DAVIS, called as a witness on behalf of the defendants, being duly sworn testifies as follows:

Direct examination.

By Mr. Frank:

Q. With what institution are you connected?

A. The Irving National Bank.

Q. This is a transcript of the account of A. J. Coccaro & Co. for the month of January, 1920?

A. Extracts from the month of January, 1920.

Mr. Frank: I just want the check for \$720 identified.

Mr. Podell: I have no objection. Do you want it marked?

Mr. Frank: Yes, I would like to have it marked.

Cross-examination.

By Mr. Podell:

Q. There is nothing in the records of your bank to show to whose order these checks were drawn?

A. No.

(Paper marked Defendants' Exhibit E.)

THEODORE J. MILLER, called as a witness in behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Frank:

Q. Mr. Miller, you are an attorney-at-law, are you?

A. No, I am not; I am a law clerk.

Q. You have appeared here in answer to a subpoena, to produce a certain contract from your office, between A. U. Surprenant and A. J. Coccaro & Co., have you?

A. Yes.

[fol. 294] Q. Will you produce that exhibit?

A. (Handing paper to Mr. Frank.)

Q. Was that produced from the files of your office?

A. That was.

Mr. Frank: I offer it in evidence.

Mr. Podell: No objection.

Mr. Frank: That is all, Mr. Miller.

Cross-examination.

By Mr. Podell:

Q. Whom did your office represent in that transaction, do you know?

A. No, I do not.

Q. Was A. U. Surprenant a client of your office?

A. I don't know. Mr. Kaufman, of our office, handled that transaction, and he is thoroughly familiar with the matter. He prepared the contract. I know nothing about it. I was not connected with the office at that time. Mr. Kaufman is engaged in the trial of a case in the Supreme Court.

Mr. Podell: Are you going to read it?

Mr. Frank: Yes, I am going to read it. That is all, Mr. Miller.

(Witness excused.)

(Paper marked Defendants' Exhibit F.)

Mr. Frank: Mr. Cosgrove, will you take the stand, please.

WILLIAM P. COSGROVE recalled.

Further recross-examination.

By Mr. Frank:

Q. Mr. Cosgrove, will you refer to your books, please, and give us the exact dates of any loans or transactions that you had with Mr. Coccaro or A. J. Coccaro & Co. before November 8, 1919?

A. Yes, sir.

[fol. 295] The Court: Let me see that last exhibit please.

Mr. Frank: Yes, sir (handing paper to the Court).

The Witness: January 31, 1918.

Q. And when was that repaid?

A. It was finally repaid January 29, 1920.

Q. Do I understand that was the only other transaction you had with Coccaro before this date?

A. It was.

Q. That is, there was just one transaction with Coccaro before the series that are referred to in the bill of particulars?

A. That is correct.

Q. How much did you loan him then?

A. Originally?

Q. Yes.

A. \$12,750.

Q. And when was it renewed?

A. I will have to look through my records, if I may. This has no reference whatever to renewals. This is a ledger book.

Q. If you will pardon me just a moment—have you got it there?

A. I can get it very readily, I think.

Q. All right?

A. There are a series of extensions that—

Q. (Interposing.) Just give us the extensions.

A. The loan made January 30th matured May 31, 1918.

Q. That was a six months' loan?

A. Four months. It was then extended for 119 days—we will say four months—until September 27, 1918. It was then extended for 123 days to January 28, 1919.

Q. The last extension was on what amount? In other words, to what sum had it been reduced at the time of the [fol. 296] last four month- extension?

A. I will have to follow that through to answer your question.

Q. I thought you showed me in the book yesterday that it was \$8,500. Is that correct?

A. The last extension was for \$3,500. That was made on December 30, 1919, and matured and was paid January 29, 1920.

Q. And the extension, previous to that had been in what amount?

A. October 28, 1919—

Q. (Interposing.) For how much?

A. The same amount, \$3,500.

Q. That is on this loan?

A. Yes.

Q. On this loan which originally had been made in the latter part of 1918?

A. In the first part of 1918.

Q. Yes, in the first part of 1918, and it had all been paid up to \$3,500 by October of 1919.

A. That is correct.

Q. And that was the one and only transaction that you had ever had, to your knowledge, between the Philadelphia Warehouse Company and Coccoaro?

A. It was.

Q. Up to that time?

A. It was.

Mr. Podell: Up to when?

Mr. Frank: Up to November 8th.

Q. I call your attention to a check. Will you look at that check (handing paper to witness). What is the date of that?

A. May 3, 1920.

Q. Do you recognize that check as one of the checks that was paid to you in connection with the renewal of the loan for \$36,000?

A. Let me refresh my memory.

Q. Yes, surely, go right ahead. In order to help you I [fol. 297] call your attention to Exhibit No. 39, which contains the amount, and call your attention to that which corresponds to the amount shown on that exhibit (handing paper to witness)?

A. May I just see my books a second, please?

Q. Yes, go right ahead.

A. Yes, sir.

Mr. Frank: I would like to offer that check in evidence. It is a check—

Mr. Podell (interposing): What is the amount of it?

Mr. Frank: \$269.78.

Q. And that was the total amount that the Philadelphia Warehouse Company received from Coccoaro on that date in connection with the renewal of the loan which originally was \$36,000?

A. Exactly.

Q. Had it been reduced on that date——

A. (Interposing.) To \$27,000.

Q. So this figure of \$269 was calculated on the basis of \$27,000?

A. It was.

Q. And all of the renewals and payments in connection with renewals were made to the Philadelphia Warehouse Company by checks in like manner, were they not?

A. No; there were some cases where deposits were made to our account in New York by Coccoaro. I do not know they were paid.

Q. I am not talking of payments on account of principal, I am talking about checks.

A. I believe that is correct.

Q. Now, the Philadelphia Warehouse Company was advertising for business around November, 1920, was it not?

A. In August, 1920—August, 1919?

A. 1919?

Q. Yes.

A. I do not believe it was.

[fol. 298] Q. I show you the file of the Journal of Commerce, dated August 6, 1919. Will you look at this, please (handing book to witness)? That is the Journal of Commerce in the City of New York?

A. That is our ad.

Mr. Frank: I would like to offer that in evidence.

Mr. Podell: I have not the slightest objection.

Mr. Frank: I have a certified copy of it here, which I will give to the jury.

Mr. Podell: May I see it?

Mr. Frank: Yes, surely (handing paper to Mr. Podell).

Mr. Podell: Can we not keep the original?

Mr. Frank: Ask the Journal of Commerce man.

Mr. Podell: Yes, I will consent to the use of the certified copy, but I would prefer that the record be kept.

Q. Do you recall whether that advertisement ran along for some time after the first issue there, or the issue of August, 1919?

A. I do not recall, but it is probable that it did.

Q. It was after these advertisements were put in the

paper that you came to New York City, was it, to see customers?

A. I cannot say that it was.

Q. Were you coming to New York City to see your customers before that date?

A. I was.

Mr. Frank: I offer in evidence at this time a check, dated May 3, 1920, \$269.78.

(Paper marked Defendant's Exhibit G.)

Mr. Frank: I also offer in evidence the extract from the [fol. 299] Journal of Commerce under date of August 6, 1919, and substitute in place thereof a certified copy of the said ad.

(Paper marked Defendant's Exhibit H.)

Mr. Frank: That is all.

Further redirect examination.

By Mr. Podell:

Q. Have you got a record handy as to how that amount of that check was arrived at?

A. I have.

Q. Will you please explain it?

A. We received from Mr. Cocco in connection with the extension of the \$27,000 on May 3, 1920, included in this check—

Mr. Frank: I object to this. He has already testified what his charges were. Now, his conclusion as to what each item is for—

The Witness (interposing): I beg your pardon.

Mr. Podell: No, he is explaining an item that was brought out.

The Court: Yes, that is the way I understood it.

Q. Go ahead?

A. That item included any charges—and the entries in our books will show it—

Mr. Frank (interposing): I object to this and move that it be stricken out.

The Court: Yes, strike out the last part.

Mr. Frank: I also object to the witness testifying as to what it was intended for.

Mr. Podell: I submit that is in explanation——

The Court (interposing): That last part will be stricken out.

[fol. 300] The Witness: The discount and note broker's fee on the new paper which we issued for Mr. Coccaro's account on that date, in extension of his obligation, amounted to \$196.88, and the commission we received for issuing that new paper amounted to \$67.50. The tax stamps on the notes so issued amounted to \$5.40. Those three items make the total of the amount of the check shown.

Mr. Frank: I move to strike out the answer as embodying conclusions on the part of the witness, and not a proper answer to the question.

The Court: No.

Mr. Frank: I will take an exception.

By Mr. Podell:

Q. Will you let me see that statement in evidence that we stipulated together, with the typewritten copy of the bill of particulars—your exhibit of amounts paid? Is that check referred to in this statement at all, or was it preceding the date of that?

A. It is referred to in this statement.

Q. Now, will you point to it, please?

A. May 3rd.

Q. And was \$196.86 that appears under the column of "Discount," is that the amount which you actually paid out at that time of that check for the discount of the loan?

A. It is.

Mr. Frank: I object to that. It has already been gone over.

The Court: Yes.

Mr. Podell: That is all for the present.

M. Frank: That is all.

Mr. Podell: I will call you back later, Mr. Cosgrove.

[fol. 301] Mr. Frank: Your Honor, I have a tabulation which was made by an expert accountant—merely a calculation for the benefit of the jury.

The Court: Any objection.

Mr. Podell: May I see it?

Mr. Frank: Yes, surely (handing paper to Mr. Podell). We will give you a copy.

Mr. Podell: There certainly is objection to it. First, it is a lot of conclusions——

The Court (interposing): Let me see it.

(Paper handed to the Court.)

Mr. Frank: Your Honor, it is merely a calculation from figures already in evidence.

Mr. Podell: I know, but it draws some conclusions.

The Court: Objection sustained.

Mr. Frank: Will your Honor have it marked for identification at this time?

The Court: Yes.

(Paper marked Defendant's Exhibit I for identification.)

Mr. Frank: I will call Mr. Cosgrove back.

WILLIAM P. COSGROVE recalled.

Further recross-examination.

By Mr. Frank:

Q. Mr. Cosgrove, I call your attention to a check for \$269.78. That was the check which was paid to you at the time of the extension of a loan, which extension was in the sum of \$27,000?

A. That is correct.

The Court: How much?

Mr. Frank: \$27,000.

Q. And the period of the extension was for thirty days, [fol. 302] is that right?

A. May I refresh my memory, please?

Q. Yes, surely; look at the bill of particulars.

A. That is correct.

Q. In other words, that was the total check that the Philadelphia Warehouse Company received for this \$27,000 transaction for thirty days?

A. That is correct.

Q. And how much of that \$269.78 did you say was for stamps?

A. \$5.40.

Q. So that the net amount of this check exclusive of stamps, including all charges, was \$264.38?

A. I will assume that is correct.

Q. Well, that is the difference, as I figure it.

Mr. Frank: This paper has been marked.

Further redirect examination.

By Mr. Podell:

Q. What was the rate of discount on that transaction, will you tell us?

Mr. Frank: I don't know what that means.

A. $7\frac{1}{4}$ per cent.

(Paper marked Defendant's Exhibit J, for Identification.)

Further recross-examination.

By Mr. Frank:

Q. Will you calculate for us, please, what the total proportion or percentage is per annum on the sum of \$269.78 less the stamp item that you gave us, the sum of \$27,000 for thirty days—I mean the total percentage. Here are all these papers that have been marked for identification, and they may help you (handing papers to witness).

Mr. Podell: I shall object to that on the ground—

[fol. 303] The Court (interposing): Sustained.

Mr. Frank: I except. That is all, Mr. Cosgrove.

Further redirect examination.

By Mr. Podell:

Q. Was that the prevailing rate for your promissory notes at that time, $7\frac{1}{4}$ per cent?

A. It was.

Mr. Frank: I object to that as incompetent, irrelevant and immaterial.

The Court: It may stand.

Mr. Frank: Exception.

Q. First, Mr. Cosgrove, there is a contract there on the Judge's desk referring to Exhibit F, and I ask you to look at it and tell me whether you have ever in your life seen that or a copy of it, or the original letter, or anything in connection with it?

A. I have never seen that.

Q. Were you ever consulted about any contract between Surprenant and Coccaro?

A. I was not.

Q. Do you know of any of its contents, or did you at any time, or did either of the parties ever tell you anything about it?

A. They did not.

Q. Were you ever told either by Coccaro or by Surprenant that Surprenant had an interest in the profits of Coccaro?

A. I was not.

Q. Did you ever receive a penny of any of those profits?

A. I did not.

Q. In fact, did you know anything about the arrangements or relationships between Coccaro and Surprenant, other than what you have stated here on the witness stand?

A. I did not.

Q. Now, Mr. McAndrew has testified to a conversation that he had with you.

Mr. Podell: Let me have that paper bearing McAndrew's signature.

[fol. 304] (Paper handed to Mr. Podell by an associate.)

Q. (Continuing:) In these questions that I have asked you thus far, I have said "you." By that, I refer to the Philadelphia Warehouse Company. Would that change your answer in any respect?

A. It would not. I so understood it.

Q. You have met this young man McAndrew?

A. I have.

Q. And you had talks with him at various times, did you?

A. I did not.

Q. Did he write you any letters signed by him?

A. He did.

Q. Did you look at the letters that he had written you?

A. I did.

Q. How many of them were there in all?

A. Twelve or thirteen.

Q. And were they all with reference to insurance or forwarding?

A. They were.

Q. Did they have any reference whatever to negotiating any loans?

A. They did not.

Q. You have those letters here?

A. We have.

Q. When did you see him, if at all, in New York, and on what occasions, and in what circumstances, if you can tell us?

A. I do not recall the number of times that I saw him. I do recall specifically the occasions on which I saw him. They were with reference to two matters, and in each case he was called in and requested by Mr. Coccoaro to attend to those matters. I refer first to the question of obtaining insurance certificates required in connection with certain advances which I was arranging with Mr. Coccoaro. Mr. Coccoaro called Mr. McAndrew into the office and requested that he obtain and get for me the insurance certificates re-[fol. 305] quired at that time, which he did. He also on other occasions requested Mr. McAndrew to have a check drawn to the order of Philadelphia Warehouse Company to cover its commission and the tax stamps on advances that were then being discussed between me and Mr. Coccoaro alone.

Q. Did he draw such checks and bring them in?

A. I have no knowledge as to whether he drew them, but he did bring them in.

Q. Yes. Now, I show you this slip of paper, bearing date, November 8, 1919, and bearing his signature, and ask you, first, where did he sign that?

A. In Philadelphia.

Q. Are you positive about that?

A. No, I am not.

Q. What would lead you to believe that it was in Philadelphia?

A. It was an unusual procedure to obtain—

Mr. Frank (interposing): I object.

The Court: He is asking him what leads him to believe something, and he is giving his reasons.

Mr. Frank: The witness testified it was in Philadelphia.

Mr. Podell: He did not.

Mr. Frank: McAndrew; he said he signed that in Philadelphia.

Q. You surely, at that time, did not talk with McAndrew about any loans or extensions or renewals?

A. I did not.

Q. There is not any doubt about that in your mind?

A. There is not.

Q. Now, he has testified that at or about that time in New York at 20 Broad Street, he met you in the office of Mr. Surprenant, and had a conversation. Did you ever [fol. 306] meet him at 20 Broad Street at any time in your life?

A. May I ask your meaning of the word "met?"

Q. Do you remember where the office of Mr. Surprenant was?

A. Yes, 20 Broad Street, New York City.

Q. Was it 20 Broad Street?

A. He did have an office at 10 Wall, but I believe that was prior to these loans.

Q. He said he met you in the office of A. J. Coccaro & Co. about November some time, at or about the time of the signing of this paper, I understood him to say; that he asked you if you would be interested in making a loan on some food stuffs that they had in a warehouse, and that you said as a general rule they liked to loan—that is, you like to loan your money on raw materials, but that you and he discussed the matter. Did you ever have any such talk with him?

A. I did not, neither then nor afterwards.

Q. Or at any time before that?

A. I did not.

Q. He said that you said that the probabilities were that you would make the loan, as it was more or less of a staple line. Did you ever have any such talk with him?

A. I did not.

Q. Or anything like it?

A. I did not, with him.

Q. And that he asked you what you would charge him to make a loan, and that you told him that it would cost him, as near as you could figure, one-quarter, one-half and one per cent; that he asked you whether you meant a quarter of one per cent. per annum or per month, and that you told him per month, and that he asked you why you did not tell him the exact figure, and that you said, "Well, it is the method that we apply in our payments." Did you ever say [fol. 307] any such thing to him, or ever have any such talk with him?

A. I did not.

Q. Or anything like it?

A. I did not.

Q. Either at that time or at any other time, Mr. Cosgrove?

A. I did not positively.

Q. And he said that you then said, "We get one-quarter of one per cent for our commission, we pay one-half or thereabouts, or whatever the money costs us," and that you then said, "The one per cent you pay to A. U. Surprenant & Co.;" that he asked you why he should pay A. U. Surprenant & Co., and that you told him that that was the only way he could do business with you—would be through A. U. Surprenant & Co. Was there any such talk?

A. There was not.

Q. Did you ever have any talk with him—anything like that—either at that time or any other time?

A. I did not.

Q. He said that his reason for telephoning to you getting in touch with you was to avoid paying Surprenant, and that he knew that Coccaro, on previous transaction, had made his loans through A. U. Surprenant, and that it was his duty, his work at the time with Coccaro to try to obtain those loans as cheap as possible; and then he said, "All right, because I have been instructed to get the money and we need the money." Now was there any such conversation?

A. There was not.

Q. Either at that time or at any other time, before or after?

A. There was not.

Q. In any of these loans or transactions that we have here in evidence?

A. There was not.

Q. He says that at that time he had a memorandum, a list of the merchandise, and that he gave you a list of the merchandise. Did that ever happen between you and McAndrew?

A. It did not.

[fol. 308] Q. He says that on another occasion at the time that the papers were signed, speaking of the pledge contract and the order on the broker, that we have in evidence here, he said he looked over the papers, and that he asked you what was the idea of all those papers, and that you told him that this was a form that was given to you by your attorneys, and the reason for doing it was to comply with the law. Now, did you ever say that, or anything like that, to him?

A. I did not, positively.

Q. Did you say that to him, as he testified?

A. I did not, nor did he to me.

Q. At any time?

A. No, sir.

Q. As matter of fact, before that occasion of the loan of November 8th, you had had a previous transaction with Coccoaro?

A. We had.

Q. And in that previous transaction had you used the identical forms of pledge contract and order on the broker, and the promissory notes in that transaction?

A. We had.

Q. So that it was nothing new to Coccoaro—that form?

A. It was not.

Q. He says that on one occasion, Mr. Cosgrove, he called at the office of Surprenant in your presence, that he had a check for \$720, that you were there, on January 2nd or 3rd or 5th, and that in your presence, "in the presence of Cosgrove," Mr. Surprenant said, "Tell Coccoaro for me that it was distinctly understood that in all those transactions the commission is to be paid before he receives the money." I ask you whether you were ever present at any such talk?

A. Not at any such talk. I may have been in Surprenant's office when he came there.

Q. Were you ever there when he was told that the checks [fol. 309] must be paid before the moneys—that the commissions must be paid before Coccoaro receives the money?

A. I was not.

Q. And did that ever take place in your presence?

A. It did not.

Q. Now, Mr. Cosgrove, he finally testified—and it does not appear whether it was in the form of a talk or otherwise—but Mr. McAndrew says, “Mr. Cosgrove had me to distinctly understand that I would have to pay a one per cent commission per month to Surprenant, and that would have to be paid before we would receive our check from their concern.” Did you ever, in words or in substance, or in any other manner, say what I have just read, to him?

A. I did not.

Q. With whom did you negotiate these transactions that are in evidence—who was the person?

A. With Mr. A. J. Coccoaro.

Q. And other than as you have stated, would you meet Mr. McAndrew at all?

A. Merely to pass him by and discuss the weather and pertinent topics of that character, but nothing more.

Q. Did he ever at any time negotiate any of these advance-of credit with you?

A. He did not.

Q. As a matter of fact, at or about the month or the summer of 1919 were you advertising elsewhere for business on the basis described in that advertisement?

A. I believe we were, in Philadelphia also.

Q. There has been some statement made here about your discounting the paper with one broker aggregating about two or three million dollars a year, I think the statement was. What is the gross business of your firm in this commercial paper?

A. From two to five million dollars per annum.

[fol. 310] Q. And in each instance you get this collateral security for the advance?

A. We do.

Q. Other than instances where somebody takes away the collateral, as happened in this case, is there any occasion for your putting up any sums of cash—large sums of cash?

Mr. Frank: I object to that.

Mr. Podell: All right. I will not press it.

Q. Was there a great deal of business that your concern did directly without the interference of any loan brokers?

Mr. Frank: I object to that.

The Court: He may answer.

A. There was.

Q. Then, of course, you did some business with loan brokers who brought business to you?

A. We did.

Q. Did you know or have any idea at all at any time as to what compensation or what arrangement Surprenant had with Coccaro?

A. I did not.

Q. Did you know he was getting one per cent or two per cent or three per cent?

A. I did not.

Q. And did it matter any in your arrangements with him?

Mr. Frank: I object.

The Court: Sustained.

Further recross-examination.

By Mr. Frank:

Q. You did meet McAndrew, or you saw McAndrew at Surprenant's office?

A. I believe so.

Q. And on more than one occasion?

A. Possibly.

Q. And you saw him at Coccaro's office, too, did you?

A. I did.

[fol. 311] Q. And on more than one occasion?

A. Possibly.

Q. And at the time that he came to Philadelphia, and got the first check, you were not in Philadelphia?

A. I was.

Q. And did you see him at that time?

A. I saw him.

Q. You mean you were in Philadelphia on the day you got the first check?

A. I was.

Q. Where was that?

A. In our office.

Q. Did you hand it to him?

A. I did not.

Q. Did you say anything to McAndrew at all when you gave him the first check?

A. I did not.

Q. You testified before, I think, that on one occasion the Philadelphia Warehouse Company did give part of its commission to Surprenant. Is that the only occasion now that you recall?

A. It is not.

Q. Well, what other occasions were there that you gave commissions to Surprenant, besides the one of the De Lion Rubber Company?

A. There are three others.

Q. When did you discover that?

A. By refreshing my memory by looking through the books.

Q. When did you do that?

A. Just since the beginning of this trial, when you propounded those questions to me.

Q. In connection with transactions of what other firms did you give Surprenant any money?

A. C. M. Plowman & Co., in Philadelphia.

Q. And when was that?

A. May I refresh my memory from the books?

Q. Do you not recall approximately by years?

A. I would say 1919.

Q. And what part of 1919?

A. Both spring, summer, and I should say fall, too.

[fol. 312] Q. Now, neither the De Lion Rubber Company nor Plowman & Co. had any connection with A. J. Coccoaro & Co. in any way, did they?

A. They did not.

Q. What other transactions have you refreshed your recollection as to?

A. L. Lavenson & Son, Philadelphia.

Q. Any others?

A. Union Stove Works.

Q. Where were they?

A. Peekskill, New York.

Q. When did the Laveson transaction take place?

A. I would judge in the early part of 1919.

Q. When did the Peekskill transaction take place?

A. I believe also in 1919.

Q. And about the latter part of 1919, in October or November, was it?

A. I think that is correct.

Q. Now, any others that you recall, please?

A. I do not recall any others.

Q. What book did you look at to discover those other transactions between the Philadelphia Warehouse Company and Surprenant?

A. In the ledger book of the Philadelphia Warehouse Company.

Q. Did you find any or do you recall any now about commission that you paid Sureprenant about a motor company?

A. I beg pardon?

Mr. Frank: I withdraw the question.

Q. Will you show us the book that you found these entries in, please?

A. Yes.

Q. Would you mind my looking at it?

A. No, not at all.

Q. I do not want to look at anything except the back with reference to page 421. That is all I want to see. What is the reference to Item 421, \$29.53 on February 18, 1920?

A. Bergougnan Rubber Corporation, which was the successor of the De Lion Tire and Rubber Company.

[fol. 313] Q. Do you recall any other case in which you personally had any transaction in which you paid any moneys to Mr. Surprenant?

A. I do not recall any such.

Q. Now, how frequently did you see Mr. Surprenant between—well, in the latter half of the year 1919; that is, the last six months?

A. In the latter half of 1919?

Q. Yes.

A. Quite frequently.

Q. How frequently were you in his office at 20 Broad Street?

A. I would say quite frequently, based on the number of advances made.

Q. And did you never ask him whether he was getting a commission in connection with the Coccaro loan?

A. I did not.

Q. And he never told you that he was getting a commission?

A. He did not.

Mr. Frank: That is all.

The Court: Quarter past two, gentlemen.

Recess.

Afternoon Session

WILLIAM P. COSGROVE resumed the stand:

Further redirect examination.

By Mr. Podell:

Q. Concerning moneys that you paid Surprenant on other transactions, first let me ask you, did you ever receive money from Surprenant on any transaction for anything?

A. We did not.

Q. And all these items that you have testified to are the items where you paid Surprenant?

A. They are.

Q. Part of the commission that you received?

A. They are.

[fol. 314] Q. Now, in those instances that you have given, what did you pay him compared to what you received?

A. One-sixth of the amount we received.

Q. Have you got the dollars and cents of it, so that you can give us the figures?

A. I have just added it up. It amounts to \$712 for the year 1919.

Q. Well, what are the individual items on those things, if you will just give them to us quickly?

A. Did you want these month by month, or item by item?

Q. Just give us a few so we will see what the amounts are like.

A. The month of February, \$216; the month of March, \$124; the month of April, \$85; the month of June, \$14. I am just giving you the round figures.

A Juror: 1920?

The Witness: 1919. The month of June, \$81; the month of July, \$71; the month of September, \$14; the month of October, \$5; the month of November, \$57; the month of December, \$40.

Q. And these other accounts that you have mentioned had nothing whatever to do with the account in suit—that is, with Coccoaro?

A. They are.

Q. Did you pay him anything on the Coccoaro accounts at any time?

A. We did not.

Q. Not a cent?

A. No, sir.

Q. And did he pay you anything on the Coccoaro accounts at any time?

A. He did not.

Q. Now, Mr. Cosgrove, will you please tell us who are the members of your Board of Directors of the Philadelphia Warehouse Company?

A. Well, there is—

Mr. Frank (interposing): I object to that as entirely in-
[fol. 315] competent, irrelevant and immaterial.

Mr. Podell: I think we are entitled to show who the people are that are conducting this business, your Honor.

Mr. Frank: I object to it.

Mr. Podell: The plaintiff is a corporation, and the character of its business is very seriously impeached, and I think it is at least my duty to let the jury know the type of men who are running its business.

Mr. Frank: I object; we are not impeaching them at all. I object to the form of the question.

The Court: Objection sustained.

Mr. Podell: I except.

Q. Have you had occasion to look at the quotations of foodstuffs in the Journal of Commerce from time to time?

A. I do have, yes, sir.

Q. And do they have daily quotations of canned salmon?

A. They do.

Mr. Podell: I would like to offer in evidence the quotation for canned salmon—I will offer it for the whole month of

February, if you want them, Mr. Frank—quotations of February 18, 1920, No. 1 tall pink—am I right as to my quotation here? I think I put a circle around the wrong number. Will you step down here, please? Is that it, pink No. 1 tall (indicating)?

The Witness: That is it, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Podell: Reading from the date of February 18th, \$2.05.

Mr. Frank: I object to counsel reading anything from a [fol. 316] paper that is not in evidence.

Mr. Podell: I am offering it.

Mr. Frank: I object to it as incompetent, irrelevant and immaterial.

Mr. Podell: It has been first referred to by my adversary. He asked my client or the witness that I produced as an expert, is it true that the Journal of Commerce publishes daily quotations of No. 1 tall pink salmon. He called for the contents.

The Court: No, he did not call for the contents. He was testing his knowledge, trying to find out the basis of his knowledge. That does not make it admissible.

Mr. Podell: In the question did he not ask him substantially what was contained in the Journal of Commerce?

The Court: I do not think he did.

Mr. Podell: Then, I will just ask to have it marked for identification.

Mr. Frank: No objection.

Mr. Podell: That applies to all the other entries that I have for February of 1920.

Mr. Frank: Let my associates look at it. They may even consent to its going in.

Mr. Podell: All right.

Mr. Frank: Let them look at the records.

Mr. Podell: All right, surely (handing book to Mr. Frank). That is all, Mr. Cosgrove.

Mr. Frank: That is all, Mr. Cosgrove.

(Witness excused.)

Mr. Podell: The plaintiff rests its case.

Plaintiff rests.

[fol. 317] (Paper marked Plaintiff's Exhibit No. 54 for Identification.)

Mr. Frank: I renew all the motions that were made at the close of the plaintiff's case.

The Court: Same ruling.

Mr. Frank: You will give me an exception?

The Court: Yes.

Mr. Frank: I have no objection to this going in.

Mr. Podell: Quotation of February 18th—I will just read them—1920, No. 1 tall pink 2.05 to 2.10 per dozen.

Quotation of February 19th, the same—2.05-2.10 per dozen.

Same quotation for February 25th, No. 1 tall pink 2.05 to 2.10 per dozen.

Now, your Honor, may the record also note the computation—

Mr. Frank (interposing): I object to any computation.

Mr. Podell: This is merely the amount of our claim—

Mr. Frank (interposing): But I have offered the same computation.

Mr. Podell: No, you did not; you offered something altogether different. If you question the computation—

Mr. Frank (interposing): I do not question it at all, but I do not concede it, because I have not seen it, and don't know whether it is correct or not.

The Court: Your computation depends upon what the jury may find to be the market price, if you win.

Mr. Podell: Well, we have testified to the market price. [fol. 318] The Court: I know, but then there are ranges in the market price there.

Mr. Podell: I do not know how else we can—

The Court (interposing): Quite a range, when it comes to this size order, the jury can find.

Mr. Podell: Well, the figures are in the record anyway. The only question is the question of interest. We have computed that and the dates—

Mr. Frank (interposing): I object to that.

The Court: The jury can compute the interest if it becomes necessary.

Mr. Podell: One more of these items, Mr. Frank—

Mr. Frank: You can read anything you want.

Mr. Podell: Pink No. 1 tall \$2 on the 12th day of March. On March 2nd, same item, \$2, is that it?

All right; now, your Honor, I move to strike out the second defense—the one relating to the filing of notice, etc. No requisite and nothing has been proven with respect to it, and I move to strike that from the answer.

The Court: Have you anything to say, Mr. Frank?

Mr. Frank: Well, I offered the evidence and your Honor excluded it.

The Court: Motion granted.

Mr. Frank: Your Honor will give me an exception?

The Court: Yes.

Mr. Podell: I likewise move to strike out the first defense, on the ground that there has been no evidence of usury established as a matter of law.

[fol. 319] The Court: Overruled.

Mr. Podell: I ask your Honor to keep in mind the steps that were taken, as the record clearly shows; that the agreement was to get these papers signed, and they told him that if they found his collateral was good enough, they would issue the note. Now, surely there was no contract up to that point.

The Court: Oh, yes, there was a contract, conditioned solely upon the issuance of the obligation.

Mr. Podell: And if we found that the merchandise was not what we believed to be good security, we surely, under such an arrangement, would have had the right to refuse to accept it, and to refuse to negotiate any of our paper.

The Court: Oh, certainly.

Mr. Podell: That being the case, you could scarcely say that there was a bilateral contract where both parties had made definite promises. We went to Philadelphia and made our investigations, and on the strength of our investigations, in our own judgment and discretion, concluded that we would enter into this arrangement, and thereupon issued this paper and caused it to be discounted.

Now, in every instance the testimony is, and it is undenied, that that happened in Philadelphia.

The Court: Yes, you discounted your paper in Philadelphia. You complied with the condition under which the

obligation created in New York was to become an absolute one.

Mr. Podell: You can scarcely say there was a contract in New York where one party was not bound. We were not bound. There was not an agreement——

[fol. 320] The Court (interposing): Let me see the contract.

Mr. Podell: As a matter of fact, we did not sign the contract.

The Court: Yes, I remember, but the agreement that preceded this—the basis under which this thing was done.

Mr. Podell: That is the only one. None of the conversations that Mr. Cosgrove testified to having had with Coccaro, have been denied on the record. That stands undenied at this moment. That is the only thing you have to guide you as to what occurred in those arrangements, and his testimony is undenied.

The Court: This was signed in advance?

Mr. Podell: Signed and delivered to us in advance.

The Court: Signed in New York and delivered to you in New York in advance of your drawing your note?

Mr. Podell: Exactly.

The Court: In advance of your final determination that you were going to make a loan?

Mr. Podell: Yes.

The Court: Now, you then determined to draw a note. Of course, the recitals in here are false. It has not been advanced.

Mr. Podell: That has been construed as meaning “as, when and if.” That is the legal effect that a paper of that kind has been given. Of course, if we decided to issue the note in Philadelphia, we would want them to have their collateral up, and it would be foolhardy for us to go circulating notes for a citizen like Coccaro until we had his collateral pledged to us. I think it is a case that illustrates [fol. 321] very clearly the distinction between unilateral and bilateral contracts.

The Court: When was the bill of lading turned over?

Mr. Podell: The bill of lading, on the 18th.

The Court: The bill of lading was turned over in New York on the 18th?

Mr. Podell: The 18th, yes.

The Court: To Cosgrove, and the warehouse receipt, but the transaction between the parties was consummated in New York on the 18th, subject only to the plaintiff's determining whether or not it would go on.

Mr. Podell: Oh, no, your Honor.

The Court: Whether or not it would draw its note. I do not say there was a binding obligation, but there was an option on the part of the plaintiff to convert this into a binding obligation, by its unilateral act.

Mr. Podell: I think that is a fair statement of it, but suppose we refused to consummate the transaction, I do not think your Honor would let it stand on anything that was consummated on the 18th.

The Court: That is quite true.

Mr. Podell: There being no contract, it follows that the only time when the obligations became mutual, and when there was a binding contract—

The Court (interposing): There was not any mutuality at all. It was all unilateral at all times. The plaintiff was to perform a unilateral act. Coccaro had made his offer in New York and had handed over the documents, and he had said in effect, "If you make this loan to us we will pay it back," and they made their loan to him when [fol. 322] they sent the net proceeds to the Irving Bank. That was in New York. Coccaro would not have been held liable in this case without his getting the proceeds of that discounted note, which the plaintiff discounted in Philadelphia. If the plaintiff had discounted that note in Philadelphia, and kept the proceeds for themselves, they would have had to return that bill of lading. Its only right to hold that bill of lading was by turning over the proceeds of that discounted note, putting it in that shape to Coccaro. It turned them over finally in New York, when they were sent to the Irving Bank, and the Irving Bank received them, and at that moment, and not until that moment, did Coccaro's offer ripen into a binding obligation on his part.

Mr. Podell: I concede that is the premise that my adversary has been attempting to urge, but I contend that at this moment the evidence in the record does not support the conclusion that any such arrangement was made. Your Honor cannot discard the arrangement as testified to by Cosgrove, because that is not denied, and Cosgrove dis-

tinently said that the negotiation of the promissory note was pursuant to the signed order of Coccaro; that he understood perfectly well what he was doing; that he signed an order to us authorizing us in his behalf to discount the note. There is no evidence in this case upon which to base any other arrangement. The only attempt to raise any question is an alleged conversation that this man McAndrew has injected into the record. Even conceding, for the sake of argument, that any such conversation ever took place, that would not alter the original transaction, as it was testified to by Cosgrove, between himself and Coccaro.

[fol. 323] The Court: Suppose this note were discounted; it was taken to this note broker, and he went to the bank, and he got the money from the bank, and he turned it over—supposing he turned it over in currency to the Philadelphia Warehouse Company, and the Philadelphia Warehouse Company failed to turn it over to the plaintiff, or suppose the note broker discounted the note and skipped?

Mr. Podell: I think, on the facts as the record stands at this moment, your Honor would have to say that was Coccaro's loss.

The Court: I do not think so. I think the jury would have a right to say whether or not the whole thing was a subterfuge for a loan, and if it were a subterfuge for a loan, then the loan would not be consummated until the money got to Coccaro. Now, either this is a subterfuge for a loan, to avoid the usury laws, or it is a legitimate sale of plaintiff's credit. If it is a legitimate sale of the plaintiff's credit the usury laws have no application. If it is a subterfuge for a loan, the usury laws have application, because you can no more avoid the usury laws by subterfuge than by direct act. Now, if it is a subterfuge for a loan, and if the jury should so find, when did the loan become effective? The loan was necessarily made in New York, because the loan was not complete, as a loan, until the money came to New York. The whole inception of the transaction was in New York; the completion of the loan, if the jury find it to be a loan, was in New York and, therefore, the law which will control as to the effect of usury, if it was usury, will be the law of New York.

Mr. Podell: The only suggestion I make with respect to your Honor's statement is that you are assuming what

[fol. 324] seems to me should have been proven. In other words, you cannot just take a transaction which, on its face, appears to be perfectly valid and perfectly legal, and just by casting an insinuation against it—I do not mean to say that you—Honor has done this—but it is the easiest thing in the world to take any kind of a transaction and call it a subterfuge.

The Court: I am perfectly clear on that. I will submit the question to the jury on the facts.

Mr. Podell: The testimony thus far, and the only testimony, is the testimony given by Cosgrove with regard to his transactions with Coccaro, and this man who has taken the witness stand and testified to alleged conversations certainly has not denied or contradicted any of those conversations or arrangements.

The Court: There is sufficient to raise an issue of fact, and it is for the jury to determine. The only question as to which I was at all doubtful was as to whether the law of New York or the law of Pennsylvania controls. I believe that this decision cited to me in the Appellate Division determined the law of New York. I personally believe that the decision is sound; at least, that was my view before the decision was out, that the mere fact that the note was payable in Philadelphia, was immaterial, or that the money was paid in Philadelphia, assuming it to be a loan.

Mr. Podell: You mean the ultimate repayment is immaterial?

The Court: It is not controlling, it is not decisive. I will let the jury determine it.

Mr. Podell: May I ask your Honor, for fear the jury may have misunderstood or misconstrued some of our discussion [fol. 325], that you expressly instruct them that this discussion has been about a point of law, and has nothing to do with the testimony?

The Court: I will state that fully when I come to charge.

Mr. Podell: Your Honor allows me an exception?

The Court: Yes.

Mr. Podell: And you will permit me to note on the record my motion for the direction of a verdict?

The Court: Yes.

Mr. Podell: And I except as to the main point, on the ground that there has been no defense of any kind established.

The Court: Yes.

Mr. Frank summed up to the jury on behalf of the defendant.

Adjourned to Tuesday, November 13, 1923, at 10:30 A. M.

New York, November 13, 1923.

(NOTE.—Juror No. 12 was excused, by consent, from further consideration of the case.)

Mr. Podell summed up to the jury on behalf of the plaintiff.

CHARGE TO JURY

MACK, J.:

Gentlemen of the Jury, this is a sad case, and you have got a hard job. It is a sad case because, under the evidence, somebody has been the victim of a scoundrel, and it is for you to say where the loss has got to fall. So far [fol. 326] as the evidence shows, in a broad sense you have got to choose between two equally innocent victims. So far as this merchandise is concerned, the sympathies of some of you may run to the merchant who innocently bought these goods in the regular course of his business, without any suspicion that the parties with whom he was dealing did not have the full right to sell them to him. The sympathies of some of you may run, on the other hand, to the party who first obtained the goods and from whom they were practically stolen without his knowledge or consent, and palmed off as the thief's own goods to an innocent party. You have got to discard any feelings of sympathy with one or the other; you have got to look upon the transaction in a cold-blooded way and to apply the strict rules of law as I shall lay them down to you, to the facts as you may find them to be. It is my duty to tell you what the law is that governs his case; it is your duty to accept that statement of the law. It is my privilege to express opinions on the facts, to discuss the facts, to help you come to some conclusion as to what the facts are, but if I do anything of that kind its effect on you is entirely different—should

be entirely different than the effect of my statement of a proposition of law. The latter is binding on you; my statements of fact are not binding on you, because it is for the jury to say, and only for the jury, what the real facts are. Then, having determined what the facts are, to apply the law as the Court tells them it is, to the facts, as they find them to be, and on that basis, bring in their verdict.

Now, if the facts are in dispute to that extent that the Court must say they are not so absolutely clear the one way [fol. 327] that the Court can direct the jury how to find, then if one or the other party asks the Court to direct the jury how to find, the Court must deny that request. That means, not that the Court has formed an opinion against the party who makes the motion, on what the facts really are; it means only that there is such a dispute about the facts that the Court has no right to determine it. If it did, it would usurp the function of the jury, and it is for that reason that motions of that kind are overruled, and were overruled in this case; and, of course, as I stated at the time, in response to the request of counsel, giving no expression of opinion by the Court on the ultimate fact or facts in the case.

There might have been a number of questions of fact which it would be necessary for you to determine, if they had been or could have been contested but, under the evidence and on this record, there can be no question, for the purposes of this trial, as to most of them, and there is really only one ultimate question for you to decide:

Under the evidence, the plaintiff in this case, but for the possibility that I am going to suggest—the real question for you to determine—the plaintiff had an absolute right to these goods, and that right was good as against all the world. They had this right as security for the loans that they had made to Coccaro, and that right as security holder would enable them, but for the one thing that I shall discuss hereafter, to get them back from anybody into whose hands they had come, no matter how innocent that person was—and under the evidence in this case there is not any cause to doubt the defendant's entire innocence in the trans-[fol. 328] action, but that innocence would not help them. They thought they were getting a good title, but inasmuch as the plaintiff had this security right ahead of them they

were mistaken and they would be the victims who would have to suffer the loss, unless, as I say, you determine the one question of fact in their favor. I said that the plaintiff had the title to this property as security holder. Well, if there was nothing due them at the time that the defendants got the property, then they would not have any title as security holders; then the real title would be in Coccoaro. Of course, subject to their right to work out their debt against Coccoaro out of this property—and that gave them the control of the property for all purposes so far as it was necessary to do that—Coccoaro had the right to the property; and therefore, subject to their right to work out Coccoaro's debt to them, Coccoaro had the right to sell his property to Seeman; but inasmuch as he could not destroy the plaintiff's right to work out their claim against him out of this property, Seeman Brothers took the property subject to that right on the part of the plaintiff. But if there was not any claim, if there never had been any claim; if, in other words, the claim was illegal and, therefore, not recognized as matter of law, then, of course, the plaintiff had no rights and then, of course, Coccoaro had the full right to the property, and then, of course, when he sold it to Seeman Brothers, Seeman Brothers acquired the full right; and so the real question that you will have to determine is: did the plaintiff have a valid claim up to the value of these goods, against Coccoaro, or were all of its claims vitiated by reason of illegality—and that illegality usury? Because whether [fol. 329] you like it or not, whether I like it or not, whether I think it is just, or whether you think it is just or wise, the law of the State of New York—and I have heretofore said in this case that if this is a usurious transaction, the law of the State of New York must govern—the law of the State of New York says, subject to certain exceptions, that have no place in this case, if a loan is made at a usurious rate of interest, above six per cent, the lender cannot recover a penny. Now, that may strike you, as merchants, as very, very hard. It is not the law in a good many States, but that is the law of New York; that is the law which you have sworn to apply in this case, if, under the facts, it becomes applicable. There would not be any difference in that respect whether this were a fight between Coccoaro and the plaintiff, or a fight between Seeman Brothers and the plain-

tiff. Seeman Brothers, despite their complete innocence, despite the fact that if they lose they are victimized, and have recourse only against a bankrupt scoundrel for that victimization, they stand in no better position than he stands, or would stand, if he were before you, if he had gotten hold of these goods, and if the plaintiff were trying to get them back from him. The plaintiff, however, would no more be entitled to get them back from Seeman Brothers, if the transaction under which the plaintiff got its rights was a usurious one.

Now, as I say, you may feel—naturally would feel a heap more sympathy for Seeman Brothers in this case than you would, knowing all these facts, if Coccaro were before you; but, as I said in the beginning, it is not a question of sympathy; it is a question of the cold application of the law to the facts.

Therefore, it is in no respect different than a fight between Coccaro himself and the plaintiff, and just as you might have feelings against Coccaro, just as you might think that the plaintiffs sunk \$59,000, or whatever the total amount is that they have sunk, and this fellow is a scoundrel to take advantage of the usury law—and doubtless you might—most men would think that, if the fight were between Coccaro and the plaintiff—but even in that case it would be your sworn duty, if you found the transaction to be usurious, to answer with a verdict in favor of Coccaro—and, of course, in this case if you find it usurious, to answer with a verdict in favor of Seeman Brothers. I say purposely, “if you find it usurious,” because that illustrates a principle of law that I must give you in this, as in all cases. On the face of it, the plaintiff has proven its case when it proves the loan and shows that the loan is unpaid, shows the pledge—that establishes its right when it shows that the defendants have gotten hold of the property, and have exercised a dominion over it, as they have, by selling some of it, a part of the whole; the plaintiff has then established its case, and if nothing else appeared it would be my duty to instruct you to find a verdict for the plaintiff to the value of the property that Seeman Brothers, however innocently, nevertheless, took that belonged to the plaintiff, for the purpose of applying it on this large debt.

Then the defendant comes forward and the defendant says, “Yes, that is all well and good, if there were a real

[fol. 331] debt here, but because the whole transaction is an usurious one, there is no debt here."

The defendant has got to prove that, just as the plaintiff had to prove its part; the defendant has got to prove that the transaction was usurious. That means, in a civil case, that when you get to your jury room, and when you consider who is to be believed, who is not to be believed, and you throw all of the evidence that bears on the question of usury—and I will discuss in a moment that evidence—into a mental balance, the defendant has got to weigh down that balance in its favor; it has got to weigh down that it is usurious, in order for the defense to be established; because if it weighs down in favor of the plaintiff in your minds, that it is not usurious, of course, the plaintiff wins; but if the mental scale is just even, tips neither to the one side nor the other, so that you are in doubt on the whole subject, and cannot answer, "Is it usurious or is it not usurious," then the defendant must lose. That is what is meant by the burden of proof. The one who has the burden of proof must bear the scale down, however lightly—nevertheless must weigh it down in favor of the proposition that he is urging.

In this case the proposition that the defense is urging is the proposition of usury and, therefore, the defendant must satisfy you by the weight of the evidence that the transaction was usurious; and, therefore, if it weighs just evenly, you have got to say, not having been satisfied by the weight of the evidence—you have got to answer that it is not usurious, and then the plaintiff wins.

Now, I say to you throw all of the testimony and all of the [fol. 332] evidence and all of the documents that have been brought forward, into a mental balance; but before you do that, you consider each of these witnesses; you make up your minds whether what a given witness has said is the truth—and, particularly, where there is a clash between the testimony of witnesses, you have got to make up your minds which is telling the truth. And there, again, you have got to make up your minds, after you decide that the one or the other is telling the truth, or in considering which is telling the truth, you have got to make up your minds whether the one is lying deliberately, knowingly telling a lie, or whether his memory is bad, whether he is trying to tell the truth but is mistaken. The importance of determin-

ing the latter is this: that if you conclude that on any material point any one of these parties has deliberately told an untruth, any one of the witnesses has deliberately told an untruth, you have got the right to write him down as a liar generally, and say, "I will not pay any attention to what he says." You do not have to do that; you may say, "Other things are, nevertheless, truthful that he has reported," either where there is a conflict or where there is not a conflict; but you have the right to say, "I will not take his word for anything; I do not believe what he has said."

Now, in considering just what weight you are going to give to what any witness has said, either as to transactions or as to documents, or as to anything that bears on the case, you may take into consideration as any sensible man would take into consideration the way that he answered questions, his demeanor on the witness stand, his general [fol. 333] appearance in answering questions, his frankness or lack of frankness, as it struck you, when he answered questions on direct examination or on cross examination. You may consider also his interest in the outcome of the case. If you find that he has an interest in the outcome of the case, then you may consider whether that interest is causing him to deviate from the truth or whether, despite that interest, he is nevertheless telling the truth.

All these matters, and any other things that you, as the average men, find in the testimony or the actions of the witnesses on the stand, that bear on the question of truthfulness or otherwise, are to be taken into consideration by you in determining the weight you will give to the evidence of any one of them.

Now, then, I say that the real question, under these principles of law which are to be applied when you determine the facts—the real question is, were these transactions between Coccaro and the Philadelphia Warehouse Company usurious or not usurious? I say "these transactions," because in essence there is no difference between any of the transactions. The Philadelphia concern held this paper as security not only for the one deal in which it was given, but for any other indebtedness; and I say that all of the transactions are alike, because even though in the one case the discount was $5\frac{1}{4}$ per cent, and in another case $7\frac{1}{4}$

per cent, and even though you might consider that $7\frac{1}{4}$ per cent, being above six per cent, had something to do with the question of whether it was usurious or not, there are enough transactions in this case at $5\frac{1}{4}$ per cent or at less than 6 per cent to justify a verdict for the plaintiff, if those transactions are free from usury, I say "at $5\frac{1}{4}$ per cent," [fol. 334] but if in addition to $5\frac{1}{4}$ per cent, the 3 per cent commission is to be added, so that the rate is $8\frac{1}{4}$ per cent, then a different situation arises, because $8\frac{1}{4}$ per cent is, of course, far above the legal rate, and if the transaction between these parties was a loan from this plaintiff to Coccaro, and if in addition to the $5\frac{1}{4}$ per cent discount Coccaro had to pay for the loan at the rate altogether of 8 per cent, or anything above 6 per cent, and if that was the real transaction between them, it would be usurious.

Again, if—what is his name—Surprenant—if Surprenant was employed by the plaintiff as part of its business, to go out for it and get people to borrow money from the plaintiff and in lieu of paying Surprenant a salary, they charged the borrower the amount that he was to get—I say, if he was employed by the plaintiff in that way—if he was not an entirely independent party, or if he was not employed by the borrower, but if he was employed by the plaintiff, and instead of getting a salary he was to work out his compensation indirectly, then as an employee of the plaintiff, whose duty it was to pay his own employees out of his earnings, anything that Surprenant would get in that event, added to anything that the plaintiff got directly, if bringing it to more than 6 per cent per year would make the transaction usurious, if the transaction between the plaintiff and Coccaro was a loan. On the other hand, even though it was a loan, if Surprenant had nothing to do with the plaintiff as its employee; if Coccaro, of his own accord, went out and employed Surprenant to go out and find him people who were willing to make loans to Coccaro, and if Coccaro promised Surprenant any amount of money as compensation for his services, whether it was a definite [fol. 335] sum or whether it was a percentage or anything else, as payment for his services in going out and finding independent people who would make loans to Coccaro, then what Surprenant got could not affect the question and would have no place in the calculation as to whether the

deals between the plaintiff and Coccaro were usurious or legitimate. And, of course, the fact that Surprenant might have paid the lender whom he procured a part of his own compensation, and might have received from the lender—I should have said the fact that Surprenant might have received from the lender a part of the lender's compensation, in addition to receiving from the borrower compensation for going out and bringing the parties together would not affect the transaction, and would not, of itself, tend to make it usurious if otherwise it was free from that taint.

Now, I said, "If the plaintiff made a loan to Coccaro" because it is only if the plaintiff made a loan to Coccaro that the question of usury arises. Usury is the payment or the obligation to pay a sum in excess of the legal rate—in this case, 6 per cent—for the loan of money. A man has a perfect right to sell his goods, his merchandise, at any price he pleases. You may call him a profiteer, if he is making 100 or 200 per cent profit; if he is buying something cheap and selling it at any such excessive price, but there is nothing illegal in that. Ordinarily a merchant can go out and make the best deal he can and there is no law against it. I go further; he can sell, in the same way that intangible thing called "credit," and he can charge any price he wants to for that credit, without its being illegal. So that if in [fol. 336] this case the plaintiff was an intermediary between Coccaro, as a borrower, and somebody else, whether it was Lewis, the broker, or the ultimate banks into which Lewis placed the plaintiff's paper,—I say, "if" the plaintiff was merely the intermediary through whom Coccaro was going to get loans from other people and acted not only as a broker in securing those loans for him, but as a guarantor to the lender making itself personally responsible for the repayment by Coccaro of those loans—if that was the real transaction, then the plaintiff, so far as the law is concerned, could have charged Coccaro for that sale of its credit, for the giving of its guaranty, whatever sum it pleased.

Now, there you have two possibilities. What are the real facts in this case? The surface facts may be the real facts; the surface facts, on the other hand, may be a disguise for the real facts. If people start out with the intent to commit a wrong, they do not always—probably they do not often do it openly, barefacedly; they hide it by placing a disguise over the transaction, they attempt to cover it up with

the appearance of legality, in the hope that it will not be discovered that under that surface there is illegality. The law is that the Court and the Jury penetrate beneath the surface of things and endeavor to find what the real facts are; and if they find that the real facts are in accordance with the surface appearance, then, of course, the transaction is honest. If, on the other hand, they find that the real facts are those of a loan at an usurious rate, then because on the surface it seems to be a sale of credit, a payment for a guaranty, a brokerage service, does not make it any the less usurious. And so you come down to the ultimate question in this case; and looking not only at the surface, because, of [fol. 337] course, you must consider the documents that have been presented to you, but looking also at all the testimony that has been offered in reference to those documents, and to the actual method of transacting the business between the parties, it is for you to say whether or not as between Coccaro and the Philadelphia Warehouse Company, Coccaro was borrowing money from the Philadelphia Warehouse Company at a rate of this discount plus 3 per cent, with or without something more to Surprenant, and, in that case, at a usurious rate, or whether, in fact, Coccaro was borrowing through the plaintiff from Lewis, or from the banks, to whom Lewis sold the plaintiff's notes, and in that case, was buying the plaintiff's credit facilities, in which case it would not be usurious.

Now, counsel on both sides reviewed the facts before you, and each has pointed out those things that tend to bring about a conviction on your part one way or the other way. I do not purpose at this time to discuss these different facts any more than to call your attention to some of them.

There is the advertisement. The complete advertisement was read to you. There is the contract with Surprenant before these loans; there are the documents which were presented; there is the fact that they were all ready-printed documents, suitable for a credit transaction; suitable also for disguise of an usurious transaction as a credit transaction. There is a conflict in the testimony between McAndrew and Cosgrove, and there is on one vital point a very clear conflict. If these papers were gotten up just to get around the law, and if the transaction was a loan, and given the appearance, under lawyers' advice, of a credit sale, they

do not escape the charge of usury. If, on the other hand, [fol. 338] they were not gotten up in this way, and no such statement was made, then it is for you to say whether under all the facts in the case it is your opinion that there was a loan or a sale of credit.

You can consider in that connection, of course, that Coccaro did not give any notes, that the Philadelphia Warehouse Company discounted its own notes, that when it discounted its own notes with Lewis, it was still its own money, that there was no obligation on it to hand any of that money to Coccaro, if it did not want to, and that until Coccaro got the money from the Philadelphia Warehouse Company, it was not his. You can consider, however, on the other hand, that it was not essential to the legality of the transaction that Coccaro should give his own notes; he had a perfect legal right, and the transaction would be perfectly legal, if that was the intent, in giving the order that he gave, that the Philadelphia Warehouse Company should manage the deal in such way that it would give its own note and discount it, and thereby use its high credit rating to get the money for Coccaro on the best commercial terms.

Now, as I say, you are to determine whether the surface transaction was the real transaction, or whether the real transaction was a loan from the Philadelphia Warehouse Company to Coccaro, and usurious as a loan, under the law. I should add this: if you find that there was usury—that is, that it was a loan permeated with usury, then your verdict is for the defendant. If you find that it was a sale of the plaintiff's credit, then your verdict is for the plaintiff. If your verdict is for the plaintiff, then, and not until then, do you consider the question of the amount of damages. [fol. 339] The claim is for converting in February, 1920, these goods in which the plaintiff had a monied interest far in excess of the value of the goods. If your verdict is for the plaintiff, the plaintiff is entitled to recover the value of those goods at that time. In that connection you may consider the evidence which has been brought forward as to the market value of the goods at that time. You would consider, as bearing on the market value, the evidence or the conflict in the evidence as to whether there is a difference between 999 cases of these goods, and twenty or fifty cases, in market value; whether the market value was the same

at that time for a transaction involving a large number of cases, as it would be in ten-case transactions or fifty-case transactions, involving smaller amounts. The plaintiff is entitled only to the market value for the conversion of the goods as an entirety, and the market value of the goods as an entirety is what would control. You may add to that market value in case you find for the plaintiff, interest on the amount that you find, from the date of the first sale, February, 1920, to this date, at the rate of six per cent. a year.

In bringing in your verdict, in case you find for the plaintiff, and in case you fix the damages, fix the interest separately from the value of the goods, as you find them. I say that so that there may be an opportunity of correcting your verdict, in case it should turn out that the law does not allow interest, in which event there would be no difficulty in reaching a result. But, of course, as I said before, the first thing for you to determine is: was there usury? If there was usury, the verdict is for the defendant; if there [fol. 340] was no usury, the verdict is for the plaintiff, and then you determine the damages in the way that I have stated.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Podell: Your Honor, I have no requests except if your Honor will permit me to note my exceptions to your Honor's statement to the jury that the law of New York applies, just so that my record will be consistent.

The Court: Yes.

Mr. Frank: I would like to call your Honor's attention to what I think is merely an inadvertence in charging the jury. I except to that portion of your Honor's charge in which you said that there are enough instances where the rate *af* interest was only $5\frac{1}{4}$ per cent, or the rate of discount was only $5\frac{1}{4}$ per cent., to legalize the transaction, if I understood it; and I ask your Honor to charge in that respect that the plaintiff claims in paragraph 7 of its complaint that each and every one of the transactions referred to in the bill of particulars had as additional security each and every deposit of merchandise or bill of lading as security, and it says, "as security therefor, to wit, for all of these transactions."

And I ask your Honor to charge the jury, in view of that fact, that if there was usury in any single one of these transactions, that that affects the particular claim made here by the plaintiff, and they must find for the defendant.

The Court: Do you agree to that statement?

Mr. Podell: I have no objection to taking the thing as a whole. I think what your Honor has said would substantially have the effect of taking the transactions as a whole.

The Court: No, let us get clear as to the law. My view of the law, and what I intended to state to the jury, was [fol. 341] this: that if it was a case of a loan—of course, it really makes no difference if it was a case of a loan, the three per cent. added to $5\frac{1}{4}$ per cent. makes it usurious. If it was not a case of a loan, then it is utterly immaterial whether the discount rate was $5\frac{1}{4}$ or $7\frac{1}{2}$ per cent.

Mr. Frank: That is quite true. That is why I said it was probably an inadvertence on your Honor's part.

The Court: I attempted to correct that by what I immediately added—I think I immediately added that, of course, $5\frac{1}{4}$ per cent. plus 3 per cent., which was the lowest discount rate, plus the regular so-called commission rate, would make each transaction usurious, if the transactions were loans, and not sales of credit.

Mr. Frank: I would like your Honor to charge the jury that the complaint says that simultaneously with an advance of credit in the sum of \$5,900, and the agreement for the payment thereof, and as security therefor, and inter alia, as security for other advances to be made, this security was given. I therefore ask your Honor to charge the jury that if there was—if they find that it was usury in any single one of the transactions which have been gone over here, then they must find for the defendant.

Mr. Podell: I object to that.

The Court: There is no need of my charging that, because I charged the jury that under the evidence in this case, if any one of these transactions was usurious, they were all usurious.

Mr. Frank: That is what I wanted.

The Court: There is no difference between the transactions.

[fol. 342] Mr. Frank: I also ask your Honor to charge the jury that Cosgrove in this case is an interested witness.

The Court: I have forgotten whether it is shown by the evidence that Cosgrove is a shareholder in the Philadelphia Warehouse Company?

Mr. Podell: He is not.

Mr. Frank: He is the secretary.

The Court: He is an employee of the plaintiff corporation, and it is for the jury then to say whether the fact that he is an employee of the plaintiff corporation, having to do with these transactions, in their judgment, affects the truthfulness of his testimony.

Mr. Frank: I ask your Honor to charge the jury that irrespective of the connection of Surprenant to the case, or the question of whether Surprenant received any money, if they find that the other transactions in the case were usurious, they must find for the defendant.

The Court: Yes, I thought I did so charge.

Mr. Frank: I except to your Honor's statement to the jury that if they find that Surprenant was employed by the plaintiff and received part of his compensation, that that is necessary to constitute usury with respect to his connection with the case.

The Court: In answer to your last statement, I have just charged them that his connection or lack of connection with the case would not affect it, in so far as usury is concerned, if it was a loan.

Mr. Frank: All I want your Honor to clear up is the fact that it was not necessary that Surprenant should be in the employ either generally or specially of the plaintiff in this case. If the plaintiff in this case required and [fol. 343] exacted as a condition for making the loan, or any of the loans to Coccaro, that there should be a commission of one per cent. a month to Surprenant, that that constituted usury.

The Court: I will not go so far as that. That all depends on the circumstances. In other words, if Surprenant, in accordance with this contract, which it is said was made in August, was employed by the plaintiff to go out and find borrowers for the plaintiff, and if the borrower said, "Here, you have got a contract already with this man to pay him a commission; I will not have any dealings with you unless you keep that promise to pay the brokerage," that would not affect the question of usury at all. I mean that Surpre-

nant's compensation, in the example I put, would not make an otherwise non-usurious transaction usurious.

Mr. Frank: I except to your Honor's refusal to charge as requested, and I except to the charge as modified.

The Court: Yes.

Mr. Frank: In that respect I ask your Honor to instruct the jury that if they find that the transactions between the Philadelphia Warehouse Company and Coccoaro were in fact loans and if for the making of such loans the plaintiff in this case exacted of Coccoaro that he should pay as a condition of making the loan to him, the sum of 1 per cent a month, or any other sum to Surprenant, making a total in excess of six per cent, that renders the transaction usurious.

The Court: I will not charge that, first, because I do not agree with it in its statement, and secondly, because it is totally unnecessary, because I have already charged the [fol. 344] jury that under the facts in this case if they find it was a loan it was necessarily an usurious loan, because the lowest rate of discount was $5\frac{3}{4}$ per cent, and then the 3 per cent would make $8\frac{3}{4}$ per cent.

Mr. Frank: I ask your Honor to charge the jury that in considering the testimony in this case they are not only to take the statements of the witnesses and the documentary evidence which has been offered, but the reasonable inferences which are to be drawn from the testimony in the case from their own experience.

The Court: Yes. The jury are entitled to draw any reasonable inferences from all the testimony.

Mr. Frank: I ask your Honor to charge that if when they have considered all the evidence and explanations in this case it clearly appears that all the Philadelphia Warehouse Company did or expected to do was to make a loan and that all that Coccoaro got or expected to get was money, then, in reality, any collateral or contemporaneous agreement, by virtue of which more than the amount of the lawful rate was to be obtained from Coccoaro, would in fact be but a subterfuge.

The Court: Oh, I have given that in my own language very fully. I will not adopt counsel's language. I never do, on either side.

Mr. Frank: I except.

Mr. Podell: So that there may be no confusion between what is meant by a loan and the extension of credit, may I

ask your Honor to instruct the jury that if the jury accept the testimony as given by Mr. Cosgrove, as to the real nature of this transaction, that such a transaction as Mr. Cosgrove has described, would not be usurious.

Mr. Frank: I object to that.

[fol. 345] The Court: No, I will not give it in that way. I have gone into it very fully, as to what is and what is not a loan and what is and what is not credit. All right, gentlemen.

(The jury retired at 1.22 P. M. and the Court took a recess until 2.15 P. M.)

(At 6 P. M. the jury not having agreed, with the consent of counsel on both sides, the Court ordered a sealed verdict and adjourned to Wednesday, November 14, 1923, at 10.30 A. M.)

New York, November 14, 1923.

(The jury returned a sealed verdict.)

The Court: Gentlemen of the jury, listen to your verdict. You find a verdict for the defendant, and so say you and so say you all.

Mr. Podell: Now, if your Honor please, I move to set the verdict aside on all the usual grounds specified, whatever they may be—I forget what they are at the moment—and on the ground it is against the weight of evidence and against the law.

The Court: Overruled.

Mr. Podell: Now, if I may, your Honor, before your Honor finally rules—I do not want you to disturb the findings on the facts, if there are any facts, but I would like to have an opportunity, in view of the fact that the case involves, as I think has been stated, rather questions of law—we would like to have an opportunity to brief them and submit them to your Honor for your consideration.

The Court: I think the jury had the right to consider the direct loan by the Philadelphia Warehouse Company to Coccaro—had a right to consider that they were loaning a net amount less the discount and were getting from him [fol. 346] that discount rate plus three per cent and, in that case, the Philadelphia Warehouse Company had no obliga-

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U. S. 1-18-70

Storage % of *Ref. Loco*

Ex. S. S. & R. R.

Car No. *232* Arrived

Address

Date

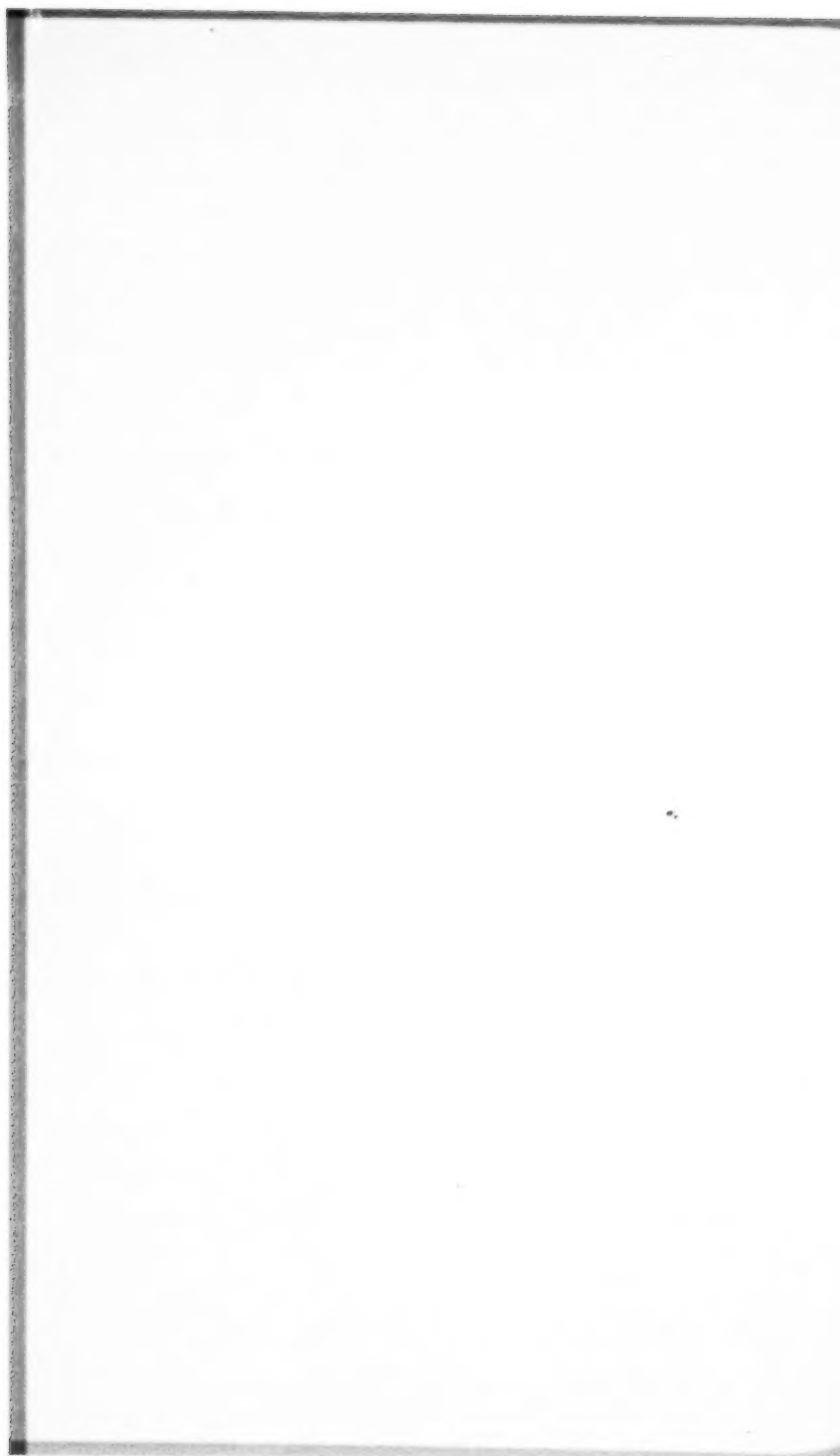
Invoice No. *344* Warehouse No. *3*

Order No. *29*

Locals	Marks	Qty	Unit	Weight	Description	Condition	Access Charge		Reg. Receipt		Subtotal		Pay		All Numbers Numbered		Remarks
							Per	Cent	Per	Cent	Per	Cent	Per	Cent	Per	Cent	
<i>1199</i>	<i>Grain</i>	<i>1199</i>	<i>4</i>	<i>1199</i>	<i>Grain</i>	<i>Grain</i>	<i>1199</i>	<i>4</i>	<i>1199</i>	<i>4</i>	<i>1199</i>	<i>4</i>	<i>1199</i>	<i>4</i>	<i>1199</i>	<i>4</i>	<i>Grain</i>
<i>999</i>	<i>Grain</i>	<i>999</i>	<i>4</i>	<i>999</i>	<i>Grain</i>	<i>Grain</i>	<i>999</i>	<i>4</i>	<i>999</i>	<i>4</i>	<i>999</i>	<i>4</i>	<i>999</i>	<i>4</i>	<i>999</i>	<i>4</i>	<i>Grain</i>

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Grain



tion whatsoever to turn over the funds that it received or did not turn over the funds that it received for the notes, but could have used them for any purpose it pleased, and therefore could be deemed to have made a perfect direct loan to Coccaro, whose loan became effective when Coccaro received the money in New York; and the only question then that might involve further law would be the fact whether Coccaro considered this loan was to be repaid in Philadelphia. But, in my judgment, the mere fact that it was to be repaid in Philadelphia, under the cases that have been cited and read, would not be sufficient in the State of New York to make the Pennsylvania law on the subject invalid.

Now, that is the only question as to which I had some doubt. If you want to brief that one question, very well.

Mr. Podell: That is all I had in mind, I do not think that case is conclusive. I think, your Honor, we can satisfy you—I will want to look it up further before I make it finally—that the rule is different in the Federal Courts and has been interpreted differently and that the place of performance is the determining factor under the federal decisions. I confess I have not had an opportunity to look into it.

The Court: All right then, I will give you that opportunity.

Mr. Frank: And may I have a copy of it?

The Court: Yes.

Mr. Podell: And your Honor will allow me an exception to your ruling?

The Court: Yes. I will reserve decision, then, instead of overruling the motion.

(Here follows Plaintiff's Exhibit 1, marked side folio page 346a)

[fol. 347]

PLAINTIFF'S EXHIBIT 2

Telephone Spring 1938

Yorke Storage & Warehouse Co., 686-688-690 Greenwich
Street

No. 873.

New York, Nov. 22/1919.

697-701 Greenwich Street. See letter.

Received on Storage at 686-688-690 Greenwich Street for
account and risk of M Philadelphia Whse Co Nine hundred
ninetynine (999) cases said to contain Canned Salmon qual-
ity, quantity and condition of contents unknown, and de-
liverable to same on payment of all charges subject to the
conditions printed below.

Storage: 3/3 per month.

Labor per c/s: —

Advanced charges: —.

Yorke Storage & Warehouse Co., per Arthur R.
Samut.

(Usual condition re loss by fire, etc.)

Marks and numbers: "Boy Blue." Rec'd 11/22/19, from
N. Y. C. R. R., Pier 16 N. R. 1 c/s 6 cans. 1 c/s 22 cans
short.

Non-negotiable is printed in red ink across face of fore-
going receipt.

[fol. 348]

PLAINTIFF'S EXHIBIT 3

A. J. Coccaro & Co., Exporters Importers, One Broadway
New York

U. S. Food Administration License No. C-123,017

No. 542C.

New York, Feb. 18, 1920.

Storekeeper Yorke Storage & Warehouse Co., 701 Green-
wich Street:

Deliver to Messrs. Seeman Bros.

.....

Quantity: (999) Cases. Nine Hundred Ninety-nine cases Salmon.

Marks: Boy Blue Brand Pink Salmon. 48/ # 1 Tall ex receipt 873. Ent.

Free time expires 2/28/20.

A. J. Coccaro & Co. J. E. Scarone.

Endorsed: Seeman Bros., per J. W. Seeman. Arnott.

[fol. 349]

PLAINTIFF'S EXHIBIT 4

Seeman's Brothers Warehouse Order #1903, dated 3/12/20, addressed to Yorke Warehouse Co. directing delivery to "our truckman" of 250 es pink salmon 4 doz. ea. "mark Boy Blue Ex. X 873 Receipt #952." Endorsed "2743."

PLAINTIFF'S EXHIBIT 5

Seeman Brothers Warehouse Order #1886, dated 3/8/20, addressed to Yorke Warehouse Co. directing delivery to "our truckman" of 250 es salmon, 4 doz. each. "Mark Boy Blue Ex. Receipt #952." Endorsed "3/8/20—75 es 2672; 3/9/20—125 es 2675; 3/12/20, 50 es 2723."

PLAINTIFF'S EXHIBIT 6

Seeman Brothers Warehouse Order #1940, dated 3/23/20, addressed to Yorke Warehouse Co. directing delivery to "our truckman" of 449 es pink salmon 4 doz. ea. "Mark Boy Blue Ex. Receipt #952." Endorsed "3/25/20—275 es 2861; 3/26/20—174 es. 2886."

PLAINTIFF'S EXHIBIT 7

Export Fish Co. order #1208 dated 3/5/20, addressed to Yorke Warehouse Co., directing delivery to "Grafton's truck" of 15 es pink salmon "X—50 es lot purchased from Seeman Brothers." Endorsed "2657."

[fol. 350]

PLAINTIFF'S EXHIBIT 8

Export Fish Co. Order #1245 dated 3/11/20, addressed to Yorke Warehouse Co., directing delivery to "Grafton's truck" of 10 cs. pink salmon. "X 50 cs. lot of Seaman Brothers." Endorsed "2726."

PLAINTIFF'S EXHIBIT 9

Yorke Warehouse & Storage Co. Inc. Receipt 2595 dated 3/2/20, signed Romaine Trucking Company acknowledging receipt from the Warehouse, for Koellisch & Fortman from Warehouse No. 2 of "21 cases c/s Boy Blue Pink Salmon delvd 3/2/20."

PLAINTIFF'S EXHIBIT 10

Yorke Warehouse & Storage Co. Inc. Receipt 2550 dated 2/25/20, signed Roman Trucking Company acknowledging receipt from the Warehouse, for Seeman Bros., from warehouse No. 2 of "4 cases c/s Salmon out of 999 case lot, delvd 2/26/20."

PLAINTIFF'S EXHIBIT 11

Yorke Warehouse & Storage Co. Inc. Receipt 2726 dated 3/12/20, signed Grafton's Trucks acknowledging receipt from the warehouse for Export Fish Company from Warehouse No. 2 of "10 cases Boy Blue Salmon, delvd 3/20/20."

PLAINTIFF'S EXHIBIT 12

Yorke Warehouse & Storage Co. Receipt 2657 dated 3/5/20 signed Grafton's Trucking Co. acknowledging receipt from the warehouse for Export Fish Co., from warehouse No. 2 of "15 cases Boy Blue Pink Salmon, delvd 3/5/20."

[fol. 351]

PLAINTIFF'S EXHIBIT 13

Yorke Warehouse & Storage Co. Inc. Receipt 2723 dated 3/12/20 signed Seeman Bros., acknowledging receipt from the warehouse for Seeman Bros., from warehouse No. 2 of "50 cases Boy Blue Salmon, lot 999 es. order 1886, delvd 3/12/20."

PLAINTIFF'S EXHIBIT 14

Yorke Warehouse & Storage Co. Inc. Receipt 2672 dated 2/8/20 signed Seeman Bros., acknowledging receipt from the warehouse for Seeman Bros., from warehouse No. 2 of "75 cases Boy Blue Salmon, delvd 3/8/20."

PLAINTIFF'S EXHIBIT 15

Yorke Warehouse & Storage Co. Inc. Receipt 2675 dated 3/9/20 signed Seeman Bros., acknowledging receipt from the warehouse for Seeman Bros., from warehouse No. 2 of "125 cases Boy Blue Salmon, delvd 3/9/20."

PLAINTIFF'S EXHIBIT 16

Yorke Warehouse & Storage Co. Inc. Receipt 2743 dated 3/15/20 signed Seeman Bros., acknowledging receipt from the warehouse for Seeman Bros., from warehouse No. 2 of "250 cases Boy Blue Pink Salmon, order 1903, delvd 3/15/20."

[fol. 352]

PLAINTIFF'S EXHIBIT 17

Yorke Warehouse & Storage Co. Inc. Receipt 2886 dated 3/26/20 signed Seeman Bros., acknowledging receipt from the warehouse for Seeman Bros., from warehouse No. 2 of "174 cases Boy Blue Pink Salmon, 1 case 10 cans out, 1 case 42 cans out, delvd 3/26/20."

PLAINTIFF'S EXHIBIT 18

Yorke Warehouse & Storage Co. Inc. Receipt 2861 dated 3/25/20 signed Seeman Bros., acknowledging receipt from the warehouse for Seeman Bros., from warehouse No. 2 of "275 cases Boy Blue salmon, delvd 3/25/20."

PLAINTIFF'S EXHIBIT 19

Remaining pages (pages other than pages 29 [Plaintiff's Exhibit 1] and 30 [back of page 29], of account of A. J. Coccaro & Co.) of storage ledger of Yorke Warehouse & Storage Co., Inc., of which the following two photostatic copies of pages and entries are particularly pertinent to this action:

(Here follow photostatic copies of pages and entries, marked side folio pages 352-a and 352-b)

[fol. 353]

PLAINTIFF'S EXHIBIT 20

Copies of certain pages of Storage Ledger of Yorke Warehouse & Storage Co. Inc., and memoranda with reference to various pages of such Storage Ledger made for plaintiff's attorneys prior to the trial:

PLAINTIFF'S EXHIBIT 21

Philadelphia, November 18, 1919.

Invoice of Canned Salmon Consigned to the Philadelphia Warehouse Company by A. J. Caccaro & Co.

1,000 cases #1 Tall Pink "Blue Boy" Salmon	4,000	
doz. @ 2.10		\$8,400

Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our war-

Wm. & A. Thompson, Whse. Co.

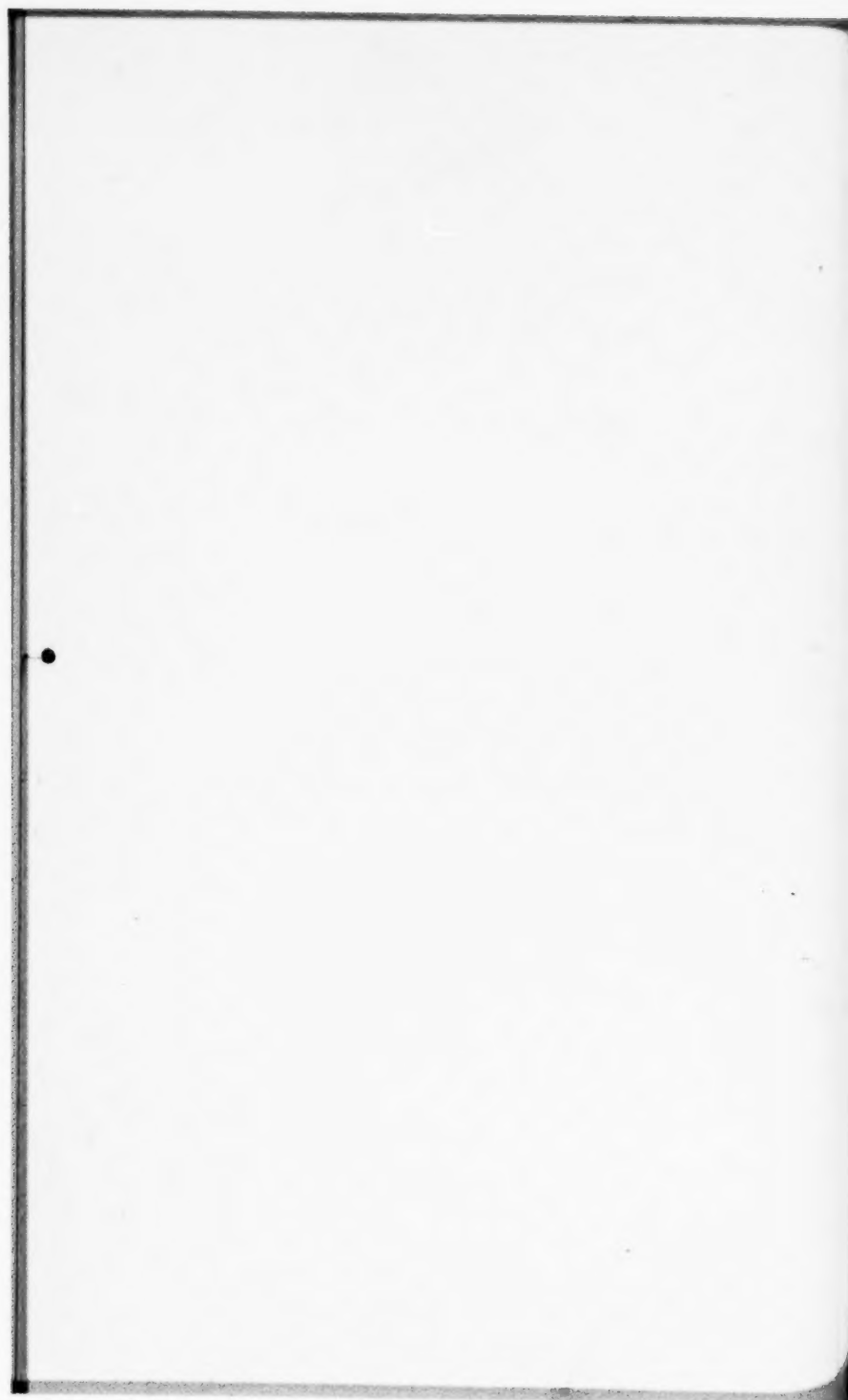
Wholesale & Retail Clothing Co.

Order No.
Warehouse No.

Date
Number No.

Shanghai Co.

100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
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ranties herein recited, by delivery to us of its promissory note for Five thousand nine hundred Dollars dated November 18, 1919, payable January 20, 1920, receiving Thirty and 48/100 Dollars as commission for its responsibility and services, as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or before the maturity of its said promissory note, Five thousand nine hundred [fol. 354] Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody, and charge.

And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract:

1. The Philadelphia Warehouse Company shall not be liable for any shortage, loss, or injury of, or to, the property in its custody, resulting from water, fire, theft, decay, leakage, wastage, accident, or any other cause than the gross negligence of the said Company or of its agents; nor for any loss from failure to insure it.

2. It is hereby warranted that title to the property described in the foregoing invoice is in the undersigned, that the said property is free from liens or claims of third parties, and that the description thereof is accurate as to quantity, quality, kind, and value; and it is hereby agreed that a margin of at least thirty per cent. upon the invoice value thereof shall be maintained, and that, in case the market value thereof shall fall, such margin shall be made good upon demand.

3. The property pledged hereunder, together with any heretofore or hereafter pledged by the undersigned to the said Company to secure this or any other liability, general or special, shall constitute a general continuing collateral security for all obligations or liabilities of the undersigned to the said Company now existing or hereafter created, contingent, absolute, liquidated, or unliquidated, and the said Company's right, title, and interest therein shall be prior to all liens or claims thereon, or on the proceeds thereof. [fol. 355] and if any property be consigned or delivered to

the said Company by the undersigned, either in substitution for property withdrawn or as additional security, such substituted or added collateral shall be subject to all the terms and conditions of this contract, including the maintenance of whatever margin may be stipulated for in case of such property.

4. Either (a) assertion by legal proceedings in any form, of an adverse claim by any third party to the property described in the foregoing invoice, or to any hereafter consigned or delivered to the said Company; or (b) fraud, or intentional or unintentional misrepresentation or concealment on the part of the undersigned; or (c) failure for twenty-four hours to comply with a demand to make good the stipulated margin; or (d) failure to pay and discharge whatever may be due at the maturity of this or of any other obligation, or of any extension of any obligation, of the undersigned to the said Company; or (e) the undersigned's default in meeting other business obligations, and the beginning of legal proceedings by any creditor or creditors to enforce the same; or (f) transfer of the undersigned's business by voluntary act to any third party, or by operation of law to an assignee, trustee, or receiver, shall render all the undersigned's obligations to the said Company immediately due and payable, notwithstanding the time limit in any or all of the instruments evidencing the same may not be then elapsed; and the said Company may charge and collect as part of the undersigned's liabilities, in addition to a reimbursement of whatever interest the said Company may pay to carry the balance of the undersigned's de-[fol. 356] faulted obligations, and a commission thereon at a rate equivalent to that last paid on this loan, all expenditures of every nature (with legal interest thereon), including all attorney fees that may be incurred for the protection of its interests and for the collection of whatever may be due by the undersigned, and costs of any litigation in which it may become involved.

5. In case of the maturing of the obligations of the undersigned under any provision of the preceding paragraph, the said Company may at any time thereafter, in the discretion of its President or Vice President, sell, or cause to be sold, at the undersigned's expense and risk, any or all prop-

erty held as collateral security for liabilities of the undersigned, at public or private sale or sales, for cash or on credit, and without notice to the undersigned; and after deducting five per cent. of the net proceeds as commissions of the said Company upon such sale or sales, shall apply the balance to the payment of whatever sum of sums may then be owing by the undersigned to the said Company, accounting to the undersigned or to the undersigned's legal representatives for the surplus, if any; and the undersigned will be liable for any deficiency. If the sale of the collateral be a public sale by auction of which due notice has been given, the said Company may become the purchaser of the same or of any part thereof, and shall in such case hold what is thus purchased as absolute owners thereof, freed and discharged from any right or equity of redemption of the undersigned, such right or equity being hereby expressly waived and released.

A. J. Coccaro & Co.

[fol. 357]

PLAINTIFF'S EXHIBIT 22

Phila., Pa., Nov. 18, 1919.

Philadelphia Warehouse Company, N. E. Cor. 3rd and Chestnut Streets, Philadelphia, Pa.

GENTLEMEN: Please deliver to your note broker, S. B. Lewis & Company for sale for our account your note for Fifty nine hundred Dollars, dated Nov. 18, 1919, due Jan. 20, 1920, issued for our account under Pledge Contract of even date therewith and mail us the net proceeds of said sale.

It is understood that the rate at which this sale is to be made is not to exceed $5\frac{3}{4}\%$ per annum and customary brokerage.

A. J. Coccaro & Co.

PLAINTIFF'S EXHIBIT 23

Sheet 1. 20 M RP.

Form 419 (Revised June 2, 1915)

Standard Form of Order Bill of Lading

Northern Pacific Railway Company

Order Bill of Lading—Original

Shipper's No. —. Agent's No. —

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading at Seattle, Washington, October 22, 1919, from Petersburg [fol. 358] Packing Corporation the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from Seattle, Washington, to New York, N. Y. is in cents per 100 lbs.

* Where rates base on value, shipper must declare and sign.

Consigned to order of Petersburg Packing Corporation.
Destination: New York, State of N. Y., County of —.

Notify A. J. Cac-aro & Co., #1 Bdway., N. Y. C., Franklin St. Delvy.

Route: Northern Pacific.

Car Initial: G. N. Car No. 19997.

[fol. 359]

No. packages.	Description of articles and special marks.	Weight.
1,000	Cs. "Boy Blue" Canned Salmon	70,000#
Petersburg Packing Corporation Shipper. C. A. Shadel.		

I hereby declare the value of the property herein described to be —.

— — (Shipper's Signature).

If charges are to be prepaid, write or stamp here "To be Prepaid."

— —.

Received \$— to apply in prepayment of the charges on the property described hereon.

— —, Agent or Cashier, per — —.

(The signature here acknowledges only the amount prepaid.)

Charges advanced: \$ None.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

On the face of foregoing Bill of Lading appear the following: United States Railroad Administration. W. G. McAdoo, Director General of Railroads. Northern Pacific Railroad.

[fol. 360] The above is to be regarded as substituted for the name of the Northern Pacific Railway Company where the same appears in this document.

New York Central R. R. Co., St. Sta., N. Y. Paid Nov. 22, 1919. Alex. Kimney, Agent, per C. W. Cutting, Cashier. Cancelled. N. Y. C. R. R. A 82058. Draft Issued. Nor.

Pac. Ry. Seattle Piers, Oct. 22, 1919. T. W. Meckstroth, Agent, per A. Petsen.

Endorsements: Petersburg Packing Corp., by J. E. Salmon. A. J. Coccaro & Co. Deliver to Yorke Storage & Warehouse Co. Philadelphia Warehouse Co., Edward H. Dunn, Treas.

For the purposes of the trial of the within entitled action the genuineness of the annexed paper marked "Northern Pacific Railway Company, order bill of lading—original" dated October 22, 1919, at Seattle, Washington, purporting [fol. 361] to cover 1,000 cases of Boy Blue canned salmon, consigned to order of Petersburg Packing Corporation, destination, New York, State of N. Y., notify A. J. Coccaro & Co., is hereby admitted. This admission is not intended to include an admission of the genuineness of the endorsements or the signatures appearing under the word "Endorsements" on the back of said exhibit and the genuineness thereof is not admitted.

Dated New York, June 6, 1922.

Cohen, Cole & Weiss, Goldsmith, Cohen, Cole & Weiss, Attorneys for Plaintiff.

Stipulation that Ernest Schoenwald of Seattle, Washington, if sworn as a witness for the plaintiff on the trial of this action, would testify as follows:

I reside at Seattle, Washington.

I am the President and General Manager of the Petersburg corporation. It has its main office at 2017 L. C. Smith Building, Seattle, Washington, and canneries at Petersburg, Alaska and Washington Bay, Alaska, and cans salmon. It was incorporated some years ago.

I have been President and General Manager of the Petersburg Packing Corporation for some years past. I was President and General Manager of that corporation on October 22, 1919. I know John E. Salmon of Seattle, Washington. I know that John E. Salmon was in the employ of the Petersburg Packing Corporation on October 22, 1919 and for some time previous thereto and for some time subsequent thereto. I know that one of his duties for the

Petersburg Packing Corporation was to endorse for the [fol. 362] Petersburg Packing Corporation bills of lading issued by railroads upon receipt from the Petersburg Packing Corporation of canned salmon for shipment to various persons at various destinations, and to deliver same either personally or by mail to consignee or to banks. I have often seen John E. Salmon write and have often seen him sign his name. The endorsement "Petersburg Packing Corp. by J. E. Salmon" on the back of the annexed billed of lading under the word "endorsements" is in the handwriting of said John E. Salmon. He is not now in the employ of Petersburg Packing Corporation.

[fol. 363]

PLAINTIFF'S EXHIBIT 24

No. 22975

\$5,900.

Philadelphia, November 19, 1919.

On January 20, 1920, after date, the Philadelphia Warehouse Company promise to pay to the order of themselves at the Chase National Bank, of New York City, fifty nine hundred Dollars, not over six thousand \$6,000, without defalcation, for value received.

F. M. Potts, President. Edward S. Dunn, Treasurer.

Endorsed: Philadelphia Warehouse Company, Edward S. Dunn, Treasurer. Pay National Park Bank, New York, N. Y. Endorsement guaranteed. National Rockland Bank of Boston, Mass. A. L. Bacon, Cashier. Received payment through New York Clearing House, prior endorsement guaranteed, Jan. 20, 1920. National Park Bnk. Cancelled: Chase—1/20/20.

[fol. 364]

PLAINTIFF'S EXHIBIT 25

S. B. Lewis & Company, Bankers, Commercial Paper, Philadelphia Bank Building, 421 Chestnut Street

Philadelphia, November 19, 1919.

Bought from Philadelphia Warehouse Co., Philadelphia, Pa. (for a/c Whom It May Concern)

Discounted from — 11/19.

Promisor	Payable	Maturity	Days	Rate	Discount	Amount	Proceeds
Phila. Warehouse Co. #22975.	Girard	Jan. 20	62	5 $\frac{3}{4}$	\$58 43	\$5,900	
			Brokerage		7 37		
					<hr/>		
					\$65 80		\$5,834.20

Cashier's Check 'Phila. Warehouse Co.'

[fol. 365]

PLAINTIFF'S EXHIBIT 26

November 19, 1919.

Mr. H. C. Chaffee, assistant cashier First National Bank,
Philadelphia, Pa.

DEAR SIR: In accordance with your recent telephone conversation with our Mr. Cosgrove, we enclose herewith your two Cashier's Cheques, Nos. 19880 and 19881, for \$8,405.20 and \$5,834.20, respectively, to our order and by us endorsed to you.

Will you kindly telephone or telegraph promptly, to-day, these amounts to Irving National Bank, New York City, to the credit of A. J. Coccaro & Co. We understand there will be no charge for this transaction other than the actual telephone or telegraph charge, which we will be glad to pay upon being advised of the amount. Kindly acknowledge receipt and confirm our understanding.

Yours truly, (Sgd.) John B. Edwards, Assistant
Secretary.

JBE:H. Encls. 2.

PLAINTIFF'S EXHIBIT 27

No. 19881.

Philadelphia, Pa., Nov. 19, 1919.

The First National Bank, 3-20,

Pay to the order of Philadelphia Warehouse Co. Fifty-eight hundred thirty-four dollars twenty cents.

\$5,834.20.

Kenton Warne, V. P., Cashier.

Cashier's check.

[fol. 366]

PLAINTIFF'S EXHIBIT 28

Philadelphia Warehouse Company

November 19, 1919.

Messrs. A. J. Coccaro & Co., 1 Broadway, New York City.

GENTLEMEN: In accordance with Pledge Contracts and form letters authorizing sale of notes thereunder for your

account for \$5,900 and \$8,500 respectively, we have today had our notes #22972/5, aggregating \$14,400, sold for your account and in accordance with the writer's conversation with your Mr. A. J. Coccaro, have delivered the proceeds to the First National Bank of this city, with instructions to wire this fund today to your credit at the Irving National Bank. We enclose herewith brokers' memoranda of the transaction.

We would appreciate your advising us whether the transaction met your requirements in time.

Yours truly, (Sgd.) Wm. P. Cosgrove, Secretary.

WPC:H.

Encl. 1.

[fol. 367]

PLAINTIFF'S EXHIBIT 29

Philadelphia Warehouse Company

November 21, 1919.

Yorke Warehouse & Storage Co., 697 Greenwich Street,
New York City.

GENTLEMEN: Pursuant to a previous understanding with you, we hand you herewith arrival notice showing arrival at New York of Car CN 19997 and we also enclose Order Bill of Lading of Northern Pacific Railway for this car, covering 1,000 cases Blue Boy Canned Salmon, shipped from Petersburg Packing Corporation at Seattle, Washington, October 22, 1919, to their shipper's order, notify A. J. Coccaro & Co., endorsed by the shipper, by A. J. Coccaro & Co., and by ourselves for delivery to you.

Will you kindly call for these goods and store them for us, sending us your Non Negotiable Receipt therefor in our name.

Yours very truly, (Sgd.) Edwards S. Dunn, Treasurer.

ESD:WH.

Encls. 2.

[fol. 368]

PLAINTIFF'S EXHIBIT 30

Philadelphia, January 20, 1920.

In consideration of \$101.49, herewith tendered to Philadelphia Warehouse Company, to cover the discount (\$69.33 Plus Stamp Tax \$1.18) required to enable it to secure the extension of its advance of credit to us in the sum of Fifty-nine hundred Dollars for a period of 63 days, from January 20, 1920, and its commission (\$30.98) for the said advance of its credit and its responsibility in the care of the collateral held by it under Pledge Contract dated November 18, 1919, we hereby request it to so extend the advance of its credit.

Due March 23, 1920.

A. J. Coccaro & Co.

[fol. 369]

PLAINTIFF'S EXHIBIT 31

No. 23275

\$2,500.

Philadelphia, January 20, 1920.

On March 23, 1920, after date Philadelphia Warehouse Company promises to pay to the order of itself, at the Girard National Bank, twenty-five hundred dollars, not over twenty-five hundred \$2,500\$, without defalcation, for value received.

Edward S. Dunn, Vice-President. Wm. P. Cosgrove,
Secy.

11593.

Endorsed Philadelphia Warehouse Company. Wm. P. Cosgrove, Secy. Pay to the order of any bank, banker or Trust Co. All prior endorsements guaranteed. Windber Trust Company, 60-551. Windber, Pa. 60-551. R. W. Maneval, Treas. Cancelled: Girard—3/23/20.

[fol. 370]

No. 23276

\$3,400.

Philadelphia, January 20, 1920.

On March 23, 1920, after date Philadelphia Warehouse Company promises to pay to the order of itself, at the

Girard National Bank, thirty-four hundred dollars, not over Four thousand \$4,000\$, without defalcation, for value received.

Edward S. Dunn, Vice-President. Wm. P. Cosgrove, Secy.

On March 23.

Endorsed Philadelphia Warehouse Company, Wm. P. Cosgrove, Secy. Received payment through the Clearing House Mar. 23, 1920. The Fourth Street Nat'l Bank of Philadelphia. Pay to the order of any bank or banker. All prior endorsements guaranteed. Feb. 19, 1920. Man-yunk National Bank, Philadelphia, Pa. 3-65. Eugene J. Morris, Cashier. Cancelled: Girard—3/23/20.

[fol. 371]

S. B. Lewis & Company, Bankers, Commercial Paper, Philadelphia Bank Building, 421 Chestnut Street

Philadelphia, January 20, 1920.

Bought from Philadelphia Warehouse Company, Philadelphia, Penna.

Discounted from 1/20.

Promisor	Payable	Maturity	Days	Rate	Discount	Amount	Proceeds
Yourselves	Girard	March 23	63	6	\$61.95	\$5,900	
#23275; \$2,500							
#23276; 2,400		Brokerage			7.38		
					<hr/>		
					\$69.33		\$5,830.67

Due Bill Order "Banks."

[fol. 372]

PLAINTIFF'S EXHIBIT 32

Letterhead of A. J. Coccaro & Company

New York, January 19, 1920.

Philadelphia Warehouse Company, Third and Chestnut
Street-, Philadelphia, Pa.

GENTLEMEN: We have your favor of the 17th inst., enclosing two forms covering extension of our obligations of \$8,500 and \$5,900 which mature on the 20th inst., which we are returning herewith duly executed together with our check for \$146.20 and \$101.49 which we trust will be found in order.

Thanking you we beg to remain,

Yours very truly, A. J. Coccaro & Co. A. J.
Coccaro.

AJC/TP.

[fol. 373]

PLAINTIFF'S EXHIBIT 33

Letterhead of A. J. Coccaro & Company

New York, March 20th, 1920.

The Philadelphia Warehouse Co., Third and Chestnut
Streets, Philadelphia, Pa.

GENTLEMEN:

Attention to Mr. W. P. Cosgrove

We are beginning to move the Salmon; the market for which is showing every evidence of strength and have firm hope that within a very short time, we will be able to dispose of the entire quantity you are holding at advantageous prices.

We herewith enclose check for \$630.00 with a request that you send us warehouse release for 100 cases.

In the meantime, we would ask for an extension of our loans for \$8,500 and \$5,900 due on the 23rd instant. We are striving to have these extensions be the last that we will request as we are making supreme efforts to liquidate our holdings.

You undoubtedly are aware that the market for Canned

and Dried fruit is improving every day and the danger of lower prices is apparently for the present eliminated.

Assuring you of our hearty appreciation of your kind courtesy on our behalf, we are,

Very truly yours, A. J. Coccaro & Company. A. J. Coccaro.

AJC—CM. Enc.

[fol. 374] PLAINTIFF'S EXHIBIT 34 FOR IDENTIFICATION

Philadelphia Warehouse Company

March 24, 1920.

A. J. Coccaro & Company, No. 1 Broadway, New York City.

GENTLEMEN: We are this morning in receipt of your favor of 22nd inst., returning extension forms duly executed, and enclosing your uncertified check for \$1,930.90 to cover charges thereunder and payment account principal of \$1,700.

As stated to your Mr. A. J. Coccaro yesterday, we must insist that in connection with any future extensions that you have in our hands on or before the day of maturity, all papers and amounts necessary to perfect the extension, as we have otherwise a serious inconvenience, which as you recall, has been repeated in several instances.

We beg to advise you that through our being able to use an independent banking source, we were enabled to have our paper discounted at the current rate, namely, 7%, without the use of the broker, whose charge of \$15.88 already remitted by you, is now taken care of by our check to your order, herewith enclosed. Since the transaction was only consummated by us today, you will observe by the bank's memorandum enclosed herewith, a difference in discount of \$2.47, which has been retained by us to reimburse us for the carrying of the amount for one day.

We enclose herewith two new forms embracing the correct charges in connection with these extensions, which we will [fol. 375] thank you to execute and return, upon receipt of which we shall be pleased to forward you the forms received today.

Yours very truly, (Sgd.) Wm. P. Cosgrove, Secretary.

PLAINTIFF'S EXHIBIT 35

No. 23543

\$5,200.

Philadelphia, March 23, 1920.

On May 24, 1920, after date, Philadelphia Warehouse Company promises to pay to the order of itself at the Girard National Bank, fifty-two hundred Dollars not over six Thousand \$6,000, without defalcation for value received.

F. M. Potts, President. Edward S. Dunn, Treasurer.

May 24.

Endorsed: Philadelphia Warehouse Company. Edward S. Dunn, Treasurer. Received payment through the Clearing House May 24, 1920. Centennial National Bank, Philadelphia. Cancelled: Girard—5/24/20.

[fol. 376]

PLAINTIFF'S EXHIBIT 36

Philadelphia, March 23, 1920.

In consideration of \$90.60, herewith tendered to Philadelphia Warehouse Company, to cover the discount (\$62.69 Plus Stamp Tax \$1.04) required to enable it to secure the extension of its advance of credit to us in the sum of Fifty two hundred Dollars for a period of 62 days from March 23, 1920, and its commission (\$26.87) for the said advance of its credit and its responsibility in the care of the collateral held by it under Pledge Contract dated November 18, 1919, we hereby request it to so extend the advance of its credit.

A. J. Coccaro & Co.

Due May 24, 1920.

[fol. 377]

PLAINTIFF'S EXHIBIT 37

The Centennial National Bank

Edward M. Malpass, President; H. E. Gerhard, Vice-President; Irwin Fisher, Cashier; Alfred W. Wright, Assistant Cashier

Philadelphia, Pa., March 24th, 1920.

Discounted this day for the Philadelphia Warehouse Company, for account of whom it may concern, their note No. 23543, dated March 23d, 1920, payable May 24th, 1920, for \$5,200 00
 Less Discount 61 das. @ 7% 61 68

Due bill to order of banks herewith \$5,138 32

Centennial National Bank. A. W. Wright, Assistant Cashier.

[fol. 378]

PLAINTIFF'S EXHIBIT 38

A. J. Coccaro & Co.

Petition in bankruptcy filed & Receiver Appointed.

1918.

Jan. 31. To Bills Payable..... 90

12,750

1918.

June 1. By Cash	208
Balance	

2,750
10,000

10,000

12,750

1919.

July 1. To Balance	113
May 28. " Bills Payable	113

10,000

1919.

May 28. By Cash	330
29. " "	330
Balance	...

8,377.81
1,622.19
8,500

1,622.19

8,500

18,500

July 1. To Balance	121
Nov 8. " Bills Payable...	121

8,500

Aug. 27. By Cash.....	362
-----------------------	-----

4,250

Nov 8. " Bills Payable... 121

16,000

Oct. 28. " " 378

750

12. “ “ “ . . . ” 122

19,300

Nov. 21. " " 386

400

18. “ “ “ “ **122**

8,500

Dec. 19. " " 398

7,009

	"	"	126
Dec. 31.	"	"	"

36,000

Balance

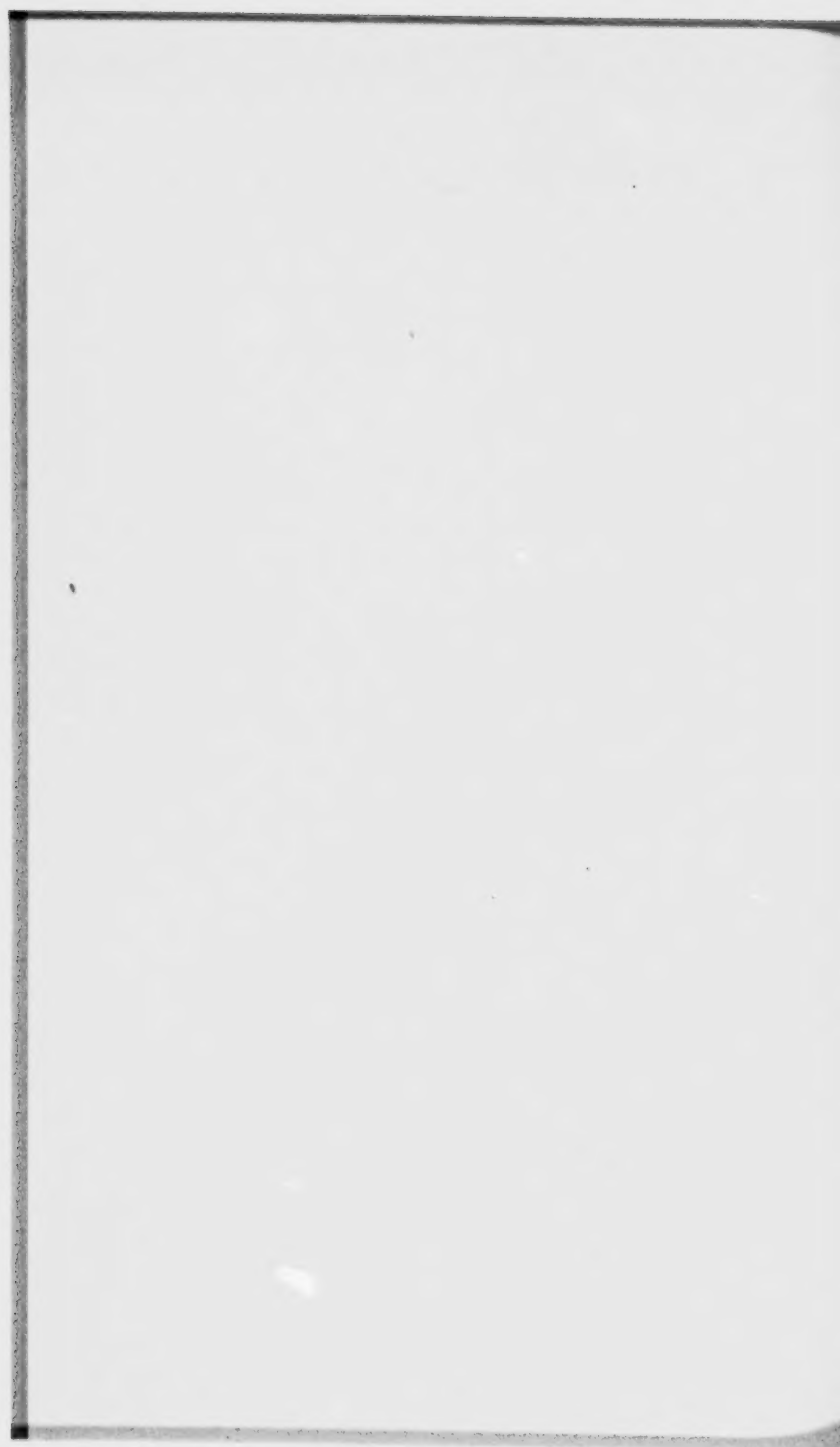
31,200

94.200

04,200

256

Date	Transaction	Acct	Amount	Total Charge	Payments		Paid by	Paid by
					Cause	Check		
Nov 8	16,000.00	A	8200 186 67	269 87	C1			8200 00
Nov 12	19,300.00	B	9650 201 04	297 54	Driving Bank	15 9133		100 361
Nov 18	8,500.00	C	4390 94 60	138 52	Driving Bank	19 0989		40 62
	5,900.00	D	3080 66 00	96 00	C7	5334		31 66
Nov 21	% D				Driving Bank	14 2394		400 00
Dec 19	% "				Check			700 00
" 31	36,000.00	E	18600 41 700	603 00	Driving Bank	35 5830		193 00
Jan 5	5,700.00	F	2850 26 17	91 67	Driving Bank	56 3653		296 64
Jan 7	Renewal	A	8267 185 30	268 20	Oct 37			271 16
" 12	"	B	5650 127 12	183 62		24		155 83
" 20	"	C	4460 99 87	146 20	CK 46	18 00		146 20
" 20	"	D	3080 69 30	101 49	" 46	1 "		101 49
March 2	"	E	18080 46 5 70	653 53		1 "		653 53
" 4	%	E				1 "		1000 00
" 5	Renewal	F	3200 64 58	90 58		1 "		90 58
" 5	%	F				1 "		700 00
" 9	%	A				1 "		700 00
" 9	Renewal	A	7470 193 38	271 16		1 "		271 16
" 12	"	B	5550 142 05	199 28		1 "		199 28
" 12	%	B		150		1 "		300 00
" 22	Renewal	C	3680 84 67	104 42		1 "		104 42
" 24	%	C		104		1 "		1000 00
" 23	Renewal	D	2687 63 68	90 60		1 "		89 59
" 24	%	D		540		1 "		700 00
May 3	Renewal	E	6750 196 80	269 78	Grinch			8000 00
" 4	%	E			Chase Bank			46 00
May 5	Renewal	F	1135 32 81	10 44	Bank			500 00
"	%	F		150 95 00	Chase Natl Bank			96 86
May 7	Renewal	A	2400 69 25	150 95 00	Chase			4500 00
" 11	%	A			Chase Natl Bank			1700 00
" 20	%	A			Chase Natl Bank			182 87
" 11	Renewal	B	4917 131 32	182 49	Chase Natl Bank			1000 00
" 14	%	B			" " "			3700 00
" 20	%	B			" " "			652 47



[fol. 379]

PLAINTIFF'S EXHIBIT 40

Statement of Credit Advances to A. J. Cocarro & Co. by the Plaintiff, Times When, and Amount of Payments Received by the Plaintiff on Account Thereof, the Balances Owing Thereon, to Which Must be Added the Interest from their respective Due Dates.

Credit advance of November 8, 1919, due Jan. 7, 1920	\$16,000
Extended Jan. 7, 1920, due Mar. 9, 1920	<u>\$16,000</u>
Rec'd on % Mar. 9, 1920	800
Extended Mar. 9, 1920, due May 7, 1920	<u>15,200</u>
Rec'd on % May 11, 1920	4,500
" " May 20, 1920	1,700
Extended May 7, 1920, due June 8, 1920	<u>6,200</u>
Balance due and unpaid	9,000
Credit Advance of November 12, 1919, due Jan. 12, 1920	\$19,300
Rec'd on % Nov. 21, 1919	400
" " Dec. 19, 1919	7,600
Extended Jan. 12, 1920, due Mar. 12, 1920	<u>8,000</u>
Rec'd on % Mar. 12, 1920	11,300
Extended Mar. 12, 1920, due May 11, 1920	300
	<u>11,000</u>

\$9,000

Rec'd on % Mar. 22, 1920	630	
" " May 14, 1920	370	
	<hr/>	1,000
Extended May 11, 1920, due July 9, 1920		10,000
Rec'd on % May 20, 1920		3,700
	<hr/>	
Balance due and unpaid		6,300
[fol. 380] Credit Advance of November 18, 1919, due Jan. 20, 1920		8,500
	<hr/>	
Extended Jan. 20, 1920, due Mar. 23, 1920		8,500
Rec'd on % Mar. 24, 1920		1,000
	<hr/>	
Extended Mar. 23, 1920, due May 21, 1920		7,500
Rec'd on % May 14, 1920		195. 05
	<hr/>	
Credit Advance of November 18, 1919, due Jan. 20, 1920		5,900
	<hr/>	
Extended Jan. 20, 1920, due Mar. 23, 1920		5,900
Rec. on % Mar. 24, 1920		700
	<hr/>	
Extended Mar. 23, 1920, due May 24, 1920		5,200
Balance due and unpaid		
Credit Advance of December 31, 1919, due Mar. 2, 1920		36,000
Rec'd on % Mar. 4, 1920		1,000
	<hr/>	
Extended Mar. 2, 1920, due May 3, 1920		35,000
	<hr/>	
		5,200. 00
		<hr/>
		7,304. 95

Credit Advances to A. J. Cocarro & Co.—Continued

Rec'd on % May 4, 1920.....	8,000
Extended May 3, 1920, due June 2, 1920.....	27,000
Balance due and unpaid.....	27,000. 00
Credit Advance of January 5, 1920, due Mar. 5, 1920.....	5,700
Rec'd on % Mar. 5, 1920.....	700
Extended Mar. 5, 1920, due May 4, 1920.....	5,000
Rec'd on % May 5, 1920.....	500
Extended May 4, 1920, due June 3, 1920.....	4,500
Balance due and unpaid.....	4,500. 00
	<hr/>
	\$59,304. 95

[fol. 381]

PLAINTIFF'S EXHIBIT 41

(Philadelphia Warehouse Co.'s papers with reference to the other five transactions with A. J. Coccaro & Co. mentioned in the complaint, and for convenience designated as follows:

Transaction A.—Credit advance of \$16,000, of Nov. 8, 1919.

Transaction B.—Credit advance of \$19,300, of Nov. 12, 1919.

Transaction C.—Credit advance of \$8,500, of Nov. 18, 1919.

Transaction E.—Credit advance of \$36,000, of Dec. 31, 1919.

Transaction F.—Credit advance of \$5,700, of Jan. 5, 1920.

Transaction D is the one relating to the "Boy Blue Canned Salmon and the various papers with reference thereto were separately offered in evidence and marked Plaintiff's Exhibits 21, 22, 24, 25, 30, 31, 35, 36 and 37.")

41-A

(Transaction A)

Philadelphia, November 8, 1919.

Invoice of California Fruits Consigned to the Philadelphia Warehouse Company by A. J. Coccaro & Co.

375 cases #2½ "Del Monte" Bartlett Pears	
750 doz. @ \$4.25	\$3,187.50

250 cases #2½ "Easter" Extra Standard	
Bartlett Pears 500 doz. @ 4.00	2,000

[fol. 382]

250 cases #2½ "Silver Bar," Bartlett Pears	
500 doz. @ 3.75	1,875

1,073 cases #2½ "Treasure" Extra Standard	
Apricots 2,146 doz. @ 3.50	7,511

248 cases #2½ "Easter" Extra Standard	
Sliced Y. C. Peaches 496 doz. @ 3.50	1,736

210 cases #2½ "Easter" Extra Standard	
Y. C. Peaches 420 doz. @ 3.50	1,470

165 cases #2½ "Silver Bar" Standard Y. C.	
Peaches 330 doz. @ 3.25	1,072.50

375 cases #2½ "Silver Bar" Standard Sliced	
Y. C. Peaches 750 doz. @ 3.25	2,437.50

	<u>\$21,289.50</u>
--	--------------------

Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Sixteen thousand Dollars dated November 8, 1919, payable January 7, 1920, receiving Eighty Dollars as commission for its responsibility and services as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or before the maturity of its said promissory note, Sixteen thousand Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody, and charge.

[fol. 383] And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract:

(Following paragraphs are similar to paragraphs numbered 1, 2, 3, 4 and 5 of Plaintiff's Exhibit 21 except that margin required by this contract is 25%.

A. J. Coccaro & Co.

(This pledge contract is also Defendants' Exhibit C, having been later offered separately by the defendants and so marked.)

(Transaction B)

Philadelphia, November 12, 1919.

Invoice of Canned Salmon and California Fruits Consigned to the Philadelphia Warehouse Company by A. J. Coccaro & Co.

2,000 cases "Diana" #1 Tall Pink Salmon	
800 doz. @ \$2.10.....	\$16,800
141 cases #2½ "Easter" Extra Standard	
Bartlett Pears 282 doz @ 4.00.....	1,128
125 cases #2½ "Silver Bar" Standard	
Bartlett Pears 250 doz @ 3.75.....	937.50
190 cases #2½ "Del Monte" Bartlett Pears	
380 doz @ 4.25.....	1,615
500 cases #2½ "Del Monte" Y. C. Peaches	
100 doz. @ 3.75.....	3,750
225 cases #2½ "Banquet" Y. C. Peaches	
450 doz @ 3.25.....	1,462.50
	<hr/>
	\$25,693.00

[fol. 384] Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Nineteen thousand three hundred Dollars dated November 12, 1919, payable January 12, 1920, receiving Ninety six and 50/100 Dollars as commission for its responsibility and services as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia at or before the maturity of its said promissory note, Nineteen thousand three hundred Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody, and charge.

And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract:

(Following paragraphs are similar to paragraphs numbered 1, 2, 3, 4 and 5 of Plaintiff's Exhibit 21, except that margin required by this contract is 25%.)

A. J. Coccaro & Co.

[fol. 385]

(Transaction C)

Philadelphia, November 18, 1919.

Invoice of Dried Apples Consigned to the Philadelphia Warehouse Company by A. J. Coccaro & Co.

1,200 boxes Prime Extra Choice Evaporated
Apples, 50 lbs. each, 60,000 lbs., 19c..... \$11,400
(Garcia & Maggini Co.)

Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Eight thousand five hundred Dollars dated November 18, 1919, payable January 20, 1920, receiving Forty three 92/100 Dollars as commission for its responsibility and services as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it at its office in the City of Philadelphia, at or before the maturity of its said promissory note, Eight thousand five hundred Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody, and charge.

And we, the undersigned, do also agree with the said Company, to the following terms and conditions as part of this contract:

(Following paragraphs are similar to paragraphs numbered 1, 2, 3, 4 and 5 of Plaintiff's Exhibit 21, except that margin required by this contract is 25%.)

A. J. Coccaro & Co.

Philadelphia, Pa., December 31, 1919.

Invoice of canned peaches, evaporated apples and prunes consigned to the Philadelphia Warehouse Company by A. J. Coccaro & Co., attached to and forming part of pledge contract of even date herewith evidencing advance by said Philadelphia Warehouse Co. to said A. J. Coccaro & Co. of its promissory notes, as stated, amounting to \$36,000.

		330 boxes	(25 lbs. each)	40/50	Sunsweet Prunes,	8,250 lbs.	@	24c	\$1,980.
Car No. Erie 90151	550	"	"	50/60	"	13,750	"	19	2,612.50
	440	"	"	60/70	"	11,000	"	17½	1,925.
	440	"	"	70/80	"	11,000	"	16	1,760.
	220	"	"	80/90	"	5,500	"	14½	797.50
	220	"	"	90/100	"	5,500	"	13½	742.50
M. & St. L. 9222	117	"	"	Unfaced Del Monte	30/40	2,925	"	27	780.75
	470	"	"	"	"	11,750	"	24	2,820.
	470	"	"	"	50/60	11,750	"	19	2,232.50
	587	"	"	"	60/70	14,675	"	17½	2,568.12
	352	"	"	"	70/80	8,900	"	16	1,408.
C. P. 206,640	235	"	"	"	80/90	5,875	"	14½	851.88
	119	"	"	"	90/100	2,975	"	13½	401.62
	117	"	"	Del Monte	30/40	2,925	"	27	780.75
	470	"	"	"	"	11,750	"	24	2,820.
	470	"	"	"	50/60	11,750	"	19	2,232.50
N. Y. C. 250,231	587	"	"	"	60/70	14,675	"	17½	2,568.12
	352	"	"	Oro	70/80	8,900	"	16	1,408.
	235	"	"	"	80/90	5,875	"	14½	851.88
	119	"	"	"	90/100	2,975	"	13½	401.62
	1200	"	"	Extra Choice Evaporated Apples, 50 lbs. each,	60,000 lbs.	@	21c		12,600.
Sliced Y. C. Peaches, 500 doz.	375 cases	#2/24	Tall Del Monte Y. C. Peaches, 750 doz.	@	\$3.00				2,250.
	125 "	#1/48	" " Sliced Y. C. Peaches, 500 doz.	@	\$2.25				1,125.
									\$47,936.24

A. J. Coccaro & Co.

[fol. 387]

Philadelphia, December 31, 1919.

Invoice of Canned Peaches, Evaporated Apples, and Prunes
 Consigned to the Philadelphia Warehouse Company by
 A. J. Coccoaro & Co.

Canned peaches, evaporated apples and prunes
 as per Invoice of even date herewith, attached
 hereto and made part hereof, valued @..... \$47,936.24

Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Thirty six thousand Dollars dated December 31, 1919, payable March 2, 1920, receiving One hundred eighty six Dollars as commission for its responsibility and services as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or before the maturity of its said promissory note, Thirty-six thousand Dollars together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody, and charge.

And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract:

[fol. 388] (Following paragraphs are similar to paragraphs numbered 1, 2, 3, 4 and 5 of Plaintiff's Exhibit 21, except that margin required by this contract is 25%.)

A. J. Coccoaro & Co.

No. —.

Philadelphia, Dec. 31, 1919.

Received from Philadelphia Warehouse Company \$—,
 also the property described as follows from collateral
 security deposited under Pledge Contract dated Dec. 31,
 1919:

360 c/s Sunsweet Prunes 50/60—9,000 lbs. 19c.... \$1,710

Car 90151

100 c/s Del Monte Prunes 40/50—2,500 lbs. 24c....	600
84 c/s Del Monte Prunes 30/40—2,100 lbs. 27c....	567
240 c/s Del Monte Prunes 50/60—6,000 lbs. 19c....	1,140
	<hr/>
	\$4,017

For which we have paid the said Company \$—, and have deposited with it in accordance with the said Pledge Contract the property described as follows, which has been accepted with the understanding that the margin to be maintained upon the invoice value thereof shall be 25 per cent.

532 c/s Ex. Choice Dried Apricots 12,525 lbs.

@ 34c. \$4,258.50

Attached to and made part of said Pledge Contract.

A. J. Coccaro & Co.

[fol. 389] No. 623.

Philadelphia, Feby. 25, 1920.

Received from Philadelphia Warehouse Company \$—, also the property described as follows from collateral security deposited under Pledge Contract dated December 31, 1919.

For which we have paid the said Company \$—, and have deposited with it in accordance with the said Pledge Contract the property described as follows, which has been accepted with the understanding that the margin to be maintained upon the invoice value thereof shall be 25 per cent.

35 Doz. H. B. Colored Cow sides special A. M.

7466½ ft. @ 53¢..... \$3,957.25

12 Doz. Black Patent Kid B M, 385 ft. @ 80¢... 308.00

6 Doz. Black Patent Kid A M 190¾ ft. @ 90¢.. 171.68

\$4,436.93

In case #¼ marked L L. G A A, Naples, Italy.

a/c reinstatement of Margin.

Attached to and made part of said Pledge Contract.

A. J. Coccaro & Co.

[fol. 390] No. 623.

Philadelphia, April 12, 1920.

Received from Philadelphia Warehouse Company \$ —, also the property described as follows from collateral security deposited under Pledge Contract dated 11/12/19 12/31/19 1/5/20, a/c reinstatement of Margin.

For which we have paid the said Company \$ —, and have deposited with it in accordance with the said Pledge Contract the property described as follows, which has been accepted with the understanding that the margin to be maintained upon the invoice value thereof shall be 25 per cent:

448 Cases "Nonpareil" Extra Yellow Free Peaches	
2½s, 896 doz. @ \$3.00 per doz.	\$2,688
502 Cases Treasure Yellow Free Peaches ex Stand-	
and 2½s, 1,004 doz. @ \$2.75.	2,761
	<hr/>
	\$5,449

Attached to and made part of said Pledge Contract.

A. J. Coccaro & Co.

[fol. 391]

(Transaction F)

Philadelphia, January 5, 1920.

Invoice of Dried Apples and Apricots (1919 Pack) Consigned to the Philadelphia Warehouse Company by A. J. Coccaro & Co.

712 boxes, 25 lb. each, Choice Blenheim Apricots,	
"Sunsweet" Brand, 14,875 bls. @ 30c.	\$4,462.50
238 boxes do. Fancy "Sunsweet" Brand, 10,850	
lbs. @ 34c.	3,689.00
	<hr/>
	\$8,151.50

Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited by delivery to us of its promissory note for Fifty seven hundred Dollars dated January 5, 1920, payable March 5, 1920, receiving Twenty eight and 50/100

Dollars as commission for its responsibility and services as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or before the maturity of its said promissory note, Fifty seven hundred Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody, and charge.

And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract:

(Following paragraphs are similar to paragraphs numbered 1, 2, 3, 4 and 5 of Plaintiff's Exhibit 21, except that margin required by this contract is 30%.)

A. J. Coccaro & Co.

41-B

(Transaction A.)

Phila., Pa., Nov. 6, 1919.

Philadelphia Warehouse Company, N. E. cor. 3rd and Chestnut streets, Philadelphia, Pa.

GENTLEMEN: Please deliver to your note brokers S. B. Lewis & Company for sale for our account your note for Sixteen thousand Dollars, dated Nov. 8, 1919, due Jan. 7, 1920, issued for our account under Pledge Contract of even date therewith and deliver the net proceeds of said sale to bearer.

It is understood that the rate at which this sale is to be made is not to exceed $5\frac{1}{2}\%$ per annum and customary brokerage.

A. J. Coccaro & Co.

(This order is also Defendant's Exhibit D, having been later offered separately by the defendants and so marked.)

[fol. 393] Also the following orders of A. J. Coccaro & Co. similar in all respects to the above order, except as follows:

Date	P. W. note for	Dated	Due	How sent	Rate %
(Translation B)					
Nov. 12, 1919.	19,300	Nov. 12, 1919.	Jan. 12, 1920.	Mail	5½
(Transaction C)					
Nov. 18, 1919.	8,500	Nov. 18, 1919.	Jan. 20, 1920.	Mail	5¾
(Transaction E)					
Dec. 31, 1919.	36,000	Dec. 31, 1919.	Mar. 2, 1920.	Mail	6
(Transaction F)					
Jan. 5, 1920.	5,700	Jan. 5, 1920.	Mar 5, 1920.	Mail	6

41-C

A. J. Coccaro & Co.'s Requests

(Transaction A)

Philadelphia, January 7th, 1920.

In consideration of \$271.20, herewith tendered to Philadelphia Warehouse Company, to cover the discount (\$185.33) Plus Stamp Tax \$3.20 required to enable it to secure the extension of its advance of credit to us in the sum of Sixteen thousand Dollars for a period of 62 days, from January 7, 1919, and its commission (\$82.67) for the said advance of its credit and its responsibility in the care of the collateral held by it under Pledge Contract dated November 8th, 1919, we hereby request it to so extend the advance of its credit due March 9th, 1920.

A. J. Coccaro & Co.

Also the following requests of A. J. Coccaro & Co. similar in all respects to the above request, except as follows:

[fol. 394]

[fol. 394]

Date	Consider- ation	Consisting of			Credit	Days	From	To
		Discount	Stamp	Commis- sion				
(Transaction A)								
Jan. 7, 1920.....	\$271.20	\$185.33	\$3.20	\$82.67	\$16,000	62	Jan. 7, 1920	Mar. 9, 1920
Mar. 9, 1920.....	271.16	193.38	3.04	74.74	15,200	59	Mar. 9, 1920	May 7, 1920
May 7, 1920.....	95.05	69.25	1.80	24.00	9,000	32	May 7, 1920	June 8, 1920
(Transaction B)								
Jan. 12, 1920.....	185.88	127.12	2.26	56.50	11,300	60	Jan. 12, 1920	Mar. 12, 1920
Mar. 12, 1920.....	199.28	142.08	2.20	55.00	11,000	60	Mar. 12, 1920	May 11, 1920
May 11, 1920.....	182.49	131.32	2.00	49.17	10,000	59	May 11, 1920	July 9, 1920
(Transaction C)								
Jan. 20, 1920.....	146.20	99.87	1.70	44.63	8,500	63	Jan. 20, 1920	Mar. 23, 1920
Mar. 23, 1920.....	124.42	86.04	1.50	36.88	7,500	59	Mar. 23, 1920	May 21, 1920
(Transaction E)								
Mar. 2, 1920.....	653.53	405.70	7.00	180.83	35,000	62	Mar. 2, 1920	May 3, 1920
May 13, 1920.....	269.78	196.88	5.40	67.50	27,000	30	May 3, 1920	June 2, 1920
(Transaction F)								
Mar. 5, 1920.....	90.58	64.58	1.00	25.00	5,000	60	Mar. 5, 1920	May 4, 1920
May 4, 1920.....	44.96	32.81	.90	11.25	4,500	30	May 4, 1920	June 3, 1920

Philadelphia Warehouse Co.'s Notes Issued Upon the Fore-
going Orders and Requests for Extensions

Transaction A

No. 22913

\$3,500.

Philadelphia, November 8, 1919.

On January 7, 1920, after date, Philadelphia Warehouse Company promises to pay to the order of itself, at the Girard National Bank, thirty-five hundred dollars, not over four thousand \$4000\$, without defalcation, for value received.

F. M. Potts, President. Wm. P. Cosgrove, Secy.

Endorsed: Philadelphia Warehouse Company. Wm. P. Cosgrove, Secy. Pay to the order of any Bank or Trust Co. Dec. 19, 1919. Prior endorsements guaranteed. The Farmers Nat'l Bank, Bloomsburg, Pa.

Also the following notes of Philadelphia Warehouse Company, similar in all respects to the above notes, except as follows:

No.	Dated	Amount	Due	Endorsed by	Paid and cancelled
22914	Nov. 8, 1919	\$2,500	Jan. 7, 1920	Metuchen National Bank, Metuchen, N. J.	Jan. 7, 1920
22915	Nov. 8, 1919	5,000	Jan. 7, 1920	Wernersville National Bank, Wernersville, Pa.	Jan. 7, 1920
22916	Nov. 8, 1919	5,000	Jan. 7, 1920	Safe Deposit & Trust Co., Newcastle, Pa.	Jan. 7, 1920
23217	Jan. 7, 1920	5,000	Mar. 9, 1920	Keystone National Bank, Manheim, Pa.	Mar. 9, 1920
23218	Jan. 7, 1920	2,500	Mar. 9, 1920	Lambertville National Bank, Lambertville, N. J.	Mar. 9, 1920
23219	Jan. 7, 1920	2,500	Mar. 9, 1920	First National Bank, Hights- town, N. J.	Mar. 9, 1920
23220	Jan. 7, 1920	2,500	Mar. 9, 1920	First National Bank, Hights- town, N. J.	Mar. 9, 1920
23221	Jan. 7, 1920	3,500	Mar. 9, 1920	National Bank of Delaware, Wilmington, Del.	Mar. 9, 1920
23496	Mar. 9, 1920	5,000	May 7, 1920	Millville National Bank, Millville, N. J.	May 7, 1920
23947	Mar. 9, 1920	5,000	May 7, 1920	Bank of Old Fort, Old Fort, N. C.	May 7, 1920
23498	Mar. 9, 1920	2,500	May 7, 1920	Keystone National Bank, Manheim, Pa.	May 7, 1920
23499	Mar. 9, 1920	2,700	May 7, 1920	Bank of Belton, Belton, S. C.	May 7, 1920

(Transaction A)—Continued

No.	Dated	Amount	Due	Endorsed by	Paid and cancelled
23655	May 7, 1920	2,500	June 8, 1920	Franklin National Bank, Philadelphia, Pa.	June 8, 1920
23656	May 7, 1920	2,500	June 8, 1920	Franklin National Bank, Philadelphia, Pa.	June 8, 1920
23657	May 7, 1920	4,000	June 8, 1920	Franklin National Bank, Philadelphia, Pa.	June 8, 1920
(Transaction B)					
22927	Nov. 12, 1919	5,000	Jan. 12, 1920	Lehigh National Bank, Cata- sauque, Pa.	Jan. 12, 1920
[fol. 397]					
22928	Nov. 12, 1919	5,000	Jan. 12, 1920	National Bank of Slatington, Slatington, Pa.	Jan. 12, 1920
22929	Nov. 12, 1919	2,500	Jan. 12, 1920	First National Bank, Oley, Pa.	Jan. 12, 1920
22930	Nov. 12, 1919	2,500	Jan. 12, 1920	Broad Street National Bank, Trenton, N. J.	Jan. 12, 1920
22931	Nov. 12, 1919	4,300	Jan. 12, 1920	Broad Street National Bank, Trenton, N. J.	Jan. 12, 1920
23238	Jan. 12, 1920	5,000	Mar. 12, 1920	National Bank of Topton, Topton, Pa.	Mar. 12, 1920
23239	Jan. 12, 1920	2,500	Mar. 12, 1920	City National Bank, Griffin, Ga.	Mar. 12, 1920

23240	Jan. 12, 1920	2,500	Mar. 12, 1920	Wernersville National Bank, Wernersville, Pa.	Mar. 12, 1920
23241	Jan. 12, 1920	1,300	Mar. 12, 1920	First National Bank, Schaeferstown, Pa.	Mar. 12, 1920
23508	Mar. 12, 1920	5,000	May 11, 1920	Franklin National Bank, Philadelphia, Pa.	May 11, 1920
23509	Mar. 12, 1920	2,500	May 11, 1920	Glen Rock State Bank, Glen Rock, Pa.	May 11, 1920
23510	Mar. 12, 1920	3,500	May 11, 1920	Franklin National Bank, Philadelphia, Pa.	May 11, 1920
23667	May 11, 1920	1,000	July 9, 1920		July 9, 1920
23668	May 11, 1920	2,000	July 9, 1920		July 9, 1920
23669	May 11, 1920	2,500	July 9, 1920	Halifax National Bank, Halifax, Pa.	July 9, 1920
23670	May 11, 1920	4,500	July 9, 1920	Franklin National Bank, Philadelphia, Pa.	July 9, 1920

(Transaction C)

22972	Nov. 18, 1919	x\$2,500	Jan. 20, 1920	National Rockland Bank, Boston, Mass.	Jan. 20, 1920
22973	Nov. 18, 1919	x 2,500	Jan. 20, 1920	National Rockland Bank, Boston, Mass.	Jan. 20, 1920
22974	Nov. 18, 1919	x 3,500	Jan. 20, 1920	National City Bank, Akron, Ohio	Jan. 20, 1920

xPayable Chase Nat'l Bank, New York City.

(Transaction C)—Continued

[fol. 398]

No.	Dated	Amount	Due	Endorsed by	Paid and cancelled
23277.	Jan. 20, 1920	5,000	Mar. 23, 1920	Windber Trust Company, Windber, Pa.	Mar. 23, 1920
23278	Jan. 20, 1920	3,500	Mar. 23, 1920	Manayunk National Bank, Philadelphia, Pa.	Mar. 23, 1920
23542	Mar. 23, 1920	7,500	May 21, 1920	Centennial National Bank, Philadelphia, Pa.	May 21, 1920
(Transaction E)					
23178	Dec. 31, 1919	5,000	Mar. 2, 1920	First National Bank, Havre de Grace, Md.	Mar. 2, 1920
23179	Dec. 31, 1919	5,000	Mar. 2, 1920	National Bank of Coates- ville, Coatesville, Pa.	Mar. 2, 1920
23180	Dec. 31, 1919	5,000	Mar. 2, 1920	National Bank of Slatington, Slatington, Pa.	Mar. 2, 1920
23181	Dec. 31, 1919	5,000	Mar. 2, 1920	Merchants Trust Co., Ches- ter, Pa.	Mar. 2, 1920
23182	Dec. 31, 1919	2,500	Mar. 2, 1920	Cumberland National Bank, Bridgetown, N. J.	Mar. 2, 1920
23183	Dec. 31, 1919	2,500	Mar. 2, 1920	First National Bank, Clifton Heights, Pa.	Mar. 2, 1920
23184	Dec. 31, 1919	2,500	Mar. 2, 1920	First National Bank, Elmer, N. J.	Mar. 2, 1920

23185	Dec. 31, 1919	2,500	Mar.	2, 1920	First National Bank, Elmer, N. J.	Mar.	2, 1920
23186	Dec. 31, 1919	2,500	Mar.	2, 1920	Second National Bank, Nazareth, Pa.	Mar.	2, 1920
23187	Dec. 31, 1919	3,500	Mar.	2, 1920	Cumberland National Bank, Bridgetown, N. J.	Mar.	2, 1920
23455	Mar. 2, 1920	5,000	May	3, 1920	Union National Bank, Wilmington, Del.	May	3, 1920
23456	Mar. 2, 1920	5,000	May	3, 1920	Union National Bank, Wilmington, Del.	May	3, 1920
23457	Mar. 2, 1920	5,000	May	3, 1920	Union National Bank, Wilmington, Del.	May	3, 1920
[fol. 399]							
23458	Mar. 2, 1920	5,000	May	3, 1920	Union National Bank, Wilmington, Del.	May	3, 1920
23459	Mar. 2, 1920	5,000	May	3, 1920	National Bank of Delaware, Wilmington, Del.	May	3, 1920
23460	Mar. 2, 1920	2,500	May	3, 1920	Richland National Bank, Richland, Pa.	May	3, 1920
23461	Mar. 2, 1920	2,500	May	3, 1920	Keystone National Bank, Manheim, Pa.	May	3, 1920
23462	Mar. 2, 1920	2,500	May	3, 1920	Cumberland National Bank, Bridgetown, N. J.	May	3, 1920
23463	Mar. 2, 1920	2,500	May	3, 1920	Cumberland National Bank, Bridgetown, N. J.	May	3, 1920
23632	May 3, 1920	5,000	June	2, 1920	Farmers and Merchants National Bank, Rockmart, Ga.	June	2, 1920

(Transaction E)—Continued

No.	Dated	Amount	Due	Endorsed by	Paid and cancelled
23633	May 3, 1920	5,000	June 2, 1920	Bordertown Banking Co., Bordertown, N. J.	June 2, 1920
23634	May 3, 1920	5,000	June 2, 1920	Bordertown Banking Co., Bordertown, N. J.	June 2, 1920
23635	May 3, 1920	2,500	June 2, 1920	Franklin National Bank, Philadelphia, Pa.	June 2, 1920
23636	May 3, 1920	2,500	June 2, 1920	Franklin National Bank, Philadelphia, Pa.	June 2, 1920
23637	May 3, 1920	2,500	June 2, 1920	Second National Bank, Mechanicsburg, Pa.	June 2, 1920
23638	May 3, 1920	2,500	June 2, 1920	Brownstown National Bank, Brownstown, Pa.	June 2, 1920
23639	May 3, 1920	2,000	June 2, 1920	Franklin National Bank, Philadelphia, Pa.	June 2, 1920

(Transaction F)

23200	Jan. 5, 1920	2,500	Mar. 5, 1920	First National Bank, Lans- ford, Pa.	Mar. 5, 1920
23201	Jan. 5, 1920	3,200	Mar. 5, 1920	New Tripoli National Bank, New Tripoli, Pa.	Mar. 5, 1920
23487	Mar. 5, 1920	5,000	May 4, 1920	Merchants and Planters Bank, Griffin, Ga.	May 4, 1920
23647	May 4, 1920	4,500	June 3, 1920	Telford National Bank, Tel- ford, Pa.	June 3, 1920

S. B. Lewis & Co.'s Reports Delivered to Philadelphia Warehouse Company

Transaction A

S. B. Lewis & Company, Bankers, Commercial Paper, Philadelphia Bank Building, 421 Chestnut Street

Philadelphia, November 8, 1919.

Bought from Philadelphia Warehouse Co., Philadelphia, Pa. (for a/c Whom It May Concern)
Discounted from — 11/.

Promisor	Payable	Maturity	Days	Rate	Discount	Amount	Proceeds
Phila. Warehouse Co.							
#22913 \$3500							
#22914 \$2500							
#22915; 6 \$5,000 each	Girard	Jan. 7	60	5½	\$146 67	\$16,000	
	Brokerage				20 00		
					<hr/>		
					\$166 67		\$15,833 33

New York Draft 'Phila. Warehouse Co.'

	draft	\$15,813 33
	cash	20
		<hr/>
		15,833 33

(Transaction F—Continued)

11/8/19.—Recd. the above proceeds. A. J. Coccaro & Co. John J. McAndrew.

(This report is also Defendants' Exhibit B, having been later offered separately by the defendants and so marked.)

Also the following reports of S. B. Lewis & Co., 421 Chestnut Street, Philadelphia, Pa., similar in all respect to the above report, except as follows:

(Here follows paster marked side folio pages 401, 402, 403.)



[fol. 401]

(Transaction A)

Date	Discounted from	Phila. whse. note number	Payable	Maturity	Days	Rate	Discount	Amount	Proceeds
1/7/20	1/7/20	23217, \$5,000; 23218-9-20; \$2,500 each; 23221, \$3,500	Gir'd	Mar. 9	62	6	\$165 33	\$16,000	\$15,814.67
				Brokerage			20 00		

Due Bill Ord. "Banks"

3/9/20	3/9	23496-7, \$5,000 each; 23498, \$2,500; 23499, \$2,700	Gir'd	May 7	59	7	174 38	15,200	15,006.62
				Brokerage			19 00		

Due Bill Ord. "Banks"

5/7/20	5/7	23655-6 x \$2,500 each; 23657 x \$4,000	Gir'd	June 6	32	7 1/4	58 00	9,000	8,930.75
				Brokerage			11 25		

Due Bill Ordr Banks

(Transaction B)

11/13/19	11/13	22927-8, \$5,000 each; 22929-30; \$2,500 each; 22931, \$4,300	Gir'd	Jan. 12	60	5 1/2	176 92	19,300	19,098.96
				Brokerage			24 12		

New York Draft "Ph. Warehouse Co."

1/12/20	1/12	23238, \$5,000; 23239-40, \$2,500 each 23241, \$1,300	Gir'd	Mar. 12	60	6	113 00	11,300	11,172.88
				Brokerage			14 12		

Due Bill Ord "Banks"

3/12/20	3/12	23508, \$5,000; 23509, \$2,500; 23510, \$3,500	Gir'd	May 11	60	7	128 33	11,000	10,857.92
				Brokerage			13 75		

[fol. 402]

Due Bill Order Banks"

5/11/20	5/11	23667, \$1,000; 23668, \$2,000; 23669, \$2,500; 23670, \$4,500	Gir'd	July 9	59	7 1/4	\$118.82	\$10,000	\$
				Brokerage			12 50		
									9,868.68

Due Bill Ordr Banks

(Transaction C)

11/19/19	11/19	22972-3, \$2,500 each; 22974, \$3,500	Cha	Jan. 20	62	5 3/4	84 17	8,500	.....
				Brokerage			10 63		

Cashiers Check 'Ph

1/20 1/20 23277, \$5,000; 23278, \$3,500 Gira

Due Bill Ord

(Transac

12/31/19 12/31 23178-9-80-1, \$5,000 each; 23182-3-4-
5-6, \$2,500 each; 23187, \$3,500 Gira

New York

3/2/20 3/2 23455-6-7-8-9, \$5,000 each; 23460-1-2-3,
\$2,500 each Gira

[fol. 403]

Due Bill Order

5/3/20 5/3 23632-3-4x, \$5,000 each; 23635-6-7-8x,
\$2,500 each; 23639x\$2,000 Gira

Due Bill Order

(Transac

1/6/20 1/6 23200, \$2,500; 23201, \$3,200 Gira

Due Bill Order

3/5/20 3/5 23487 Gira

5/4/20 5/4 23647 Gira

Due Bill Order 'B

Warehouse Co.'

Mar. 23	63	6	89 25	8,500	.....
Brokerage	.....	10 62			8,400 13

"Banks"

n E)

Mar. 2	62	6	372 00	36,000	.....
Brokerage	.....	45 00			35,583 00

Draft

May 3	62	7	421 95	35,000	.....
Brokerage	.....	43 75			34,534 30

"Banks"

June 2	30	7¼	\$163 13	\$27,000	.....
Brokerage	.....	33 75			26,803 12

"Banks"

on F)

Mar. 5	59	6	56 05	5,700	.....
Brokerage	.....	7 12			5,636 83

"Banks"

May 4	60	7	58 33	5,000	.....
Brokerage	.....	6 25			4,935 42

June 3	30	7¼	27 19	4,500	.....
Brokerage	.....	5 62			4,467 19

Banks' Herewith



[fol. 404]

41-F

(Transaction C)

The Centennial National Bank

Edward M. Malpass, President; H. E. Gerhard, Vice-President; Irwin Fisher, Cashier; Alfred W. Wright, Assistant Cashier

Philadelphia, Pa., March 24th, 1920.

Discounted this day for the Philadelphia Warehouse Company, for account of whom it may concern, their note No. 23542 dated March 23d, 1920, payable May 21st, 1920, for \$7,500.00
 Less Discount 58 das. @ 7% 84 58

Due Bill to order of Banks herewith \$7,415 42

Centennial National Bank, A. W. Wright, Assistant Cashier.

[fol. 405]

PLAINTIFF'S EXHIBIT 42

The Bank of North America

No. 310.

Philadelphia, Nov. 13, 1919.

Pay to order of Phila. Warehouse Co. Nineteen Thousand Ninety Eight Dollars Ninety Six Cents.
 \$19,098.96.

To the National City Bank, New York City.

M. J. Umpayant, Cashier.

Endorsed: Pay to the order of A. J. Coccaro & Co. Philadelphia Warehouse Co. Edwards S. Dunn, Treas. Pay Irving National Bank or Order. A. J. Coccaro & Co. Received payment P. R. No. 2 Nov. 14, 1919 through New York Clearing House. Prior endorsements guaranteed. Irving National Bank.

[fol. 406]

PLAINTIFF'S EXHIBIT 43

Letterhead of A. J. Coccaro & Company

New York, November 20, 1919.

Philadelphia Warehouse, 3d & Chestnut Sts., Philadelphia,
Pa.

GENTLEMEN:

Att. Mr. W. P. Cosgrove

In reference to order bill of lading covering one thousand cases "Boy Blue" Pink Salmon, we enclose herewith arrival notice, on which the free storage time expires Saturday, the 22nd inst.

We would thank you to provide for removal to the Yorke Storage & Warehouse Co. in accordance with agreement made. You will please attend to this immediately so that goods may be moved without delay.

Very truly yours, A. J. Coccaro & Co.

P. S.—Kindly return the attached notice with bill of lading.

Enc.

AJC/JL.

PLAINTIFF'S EXHIBIT 44

Tally slip of New York Central Railroad, Barclay Street Station, Piers 16 and 17, N. R., N. Y., dated 11/19/19, signed by F. Gallagher, showing that he checked out 1,000 cases Boy Blue Canned Salmon, consigned from Petersburg Packing Co., Seattle, Wash., of car A A 12136 Ex. G. N. 19997 to [fol. 407] order of Petersburg Packing Co., notify A. J. Coccaro & Co., No. 1 Broadway, N. Y., way-billed from Seattle, and that one case was empty and one case part full.

PLAINTIFF'S EXHIBIT 45

Delivery receipt of New York Central Railroad, Barclay Street Station, Piers 16 and 17, N. R., N. Y., dated 11/19/19, showing delivery of 999 cases Boy Blue Canned Salmon, to

truckmen of Yorke Trucking Co., consigned to order of Petersburg Packing Co., notify A. J. Coccaro & Co., No. 1 Boadway, New York, and that one case contained 26 cans and that one case of the 1,000 cases shipped from Seattle had been used to fill up slack cases.

PLAINTIFF'S EXHIBIT 46

(S. B. Lewis & Co.'s papers with reference to the six transactions between the Philadelphia Warehouse Co. and A. J. Coccaro & Co., which are respectively designated as follows:

Transaction A.—\$16,000 of Nov. 8, 1919.

Transaction B.—\$19,300 of Nov. 18, 1919.

Transaction C.—\$8,500 of Nov. 18, 1919.

Transaction D.—\$5,900 of Nov. 18, 1919.

Transaction E.—\$36,000 of Dec. 31, 1919.

Transaction F.—\$5,700 of Jan. 5, 1920.

Transaction D is the transaction with reference to the "Boy Blue Canned Salmon" mentioned in the complaint.)

Transaction C

3—A

November 19, 1919, \$8,500, due January 20, 1920.....	5¾%
Notes Nos. 22972.....	\$2,500
22973.....	2,500
22974.....	3,500

By check of First National Bank, Phila. #3963, to order of "Cashier's Check Phila. Warehouse Co."

\$8,405.20

Sold

22972. Nov. 20, 1919. National Rockland Bank, Roxbury, Boston, Mass.	2,500	5¾%
22973. Nov. 20, 1919. National Rockland Bank, Roxbury, Boston, Mass.	2,500	5¾%
22974. Dec. 6, 1919. National City Bank, Akron, Ohio	3,500	6

8,500

#3—B

January 20, 1920. \$8,500, due March 23, 1920.....	6%
Notes Nos. 23277.....	\$5,000
23278.....	3,500

By check of Girard National Bank, Phila., #1082, to order of "Due Bill order Banks" \$8,400.13

Sold

23277.	Jan. 20, 1920. Windber Trust Co., Windber, Pa.	\$5,000	6%
23278.	Jan. 20, 1920. Manayunk National Bank, Phila., Pa.	3,500	6%

8,500

[fol. 409]

Transaction D

#4—A

Nov. 19, 1919. \$5,900, due January 20, 1920 5¾%

Note No. 22975 \$5,900

By check of First National Bank, Phila. #3964 to order of "Cashier's Check Phila. Whse. Co." \$5,834.20

Sold

22975.	Nov. 20 1919. National Rockland Bank, Roxbury, Boston, Mass.	\$5,900	5¾%
	(Bill for above attached to "3—A" with additional sale)	5,900	

Transaction D—Continued

#4—B

January 20, 1920, \$5,900, due March 23, 1920 6%

Notes Nos. 23275 \$2,500
 23276 3,400

By check of Girard National Bank, Phila. # 1081 to order of "Due Bill order Banks" . . . \$5,830 67

Sold

23275. Jan. 20, 1920. Windber Trust Co., Windber, Pa. \$2,500 6%
 (See bill attached to #3-B)
 23276. Jan. 20, 1920. Manayunk National Bank, Phila., Pa. 3,400 6
 (See bill attached to #3-B)

[fol. 410]

(Transaction A)

5,900

#1—A

November 8, 1919, \$16,000, due January 7, 1920 5½%

Notes Nos. 22913 \$3,500
 22914 \$2,500
 22915 \$5,000
 22916 \$5,000

By check of First National Bank, Phila. #3935 to order of "New York Draft Phila. Whse. Co., \$15,813 33
 Check of First National Bank, Phila. #3936 for 20 00
 issued to order of "Cash" and money paid to Phila. Warehouse Co. owing to error in bill.

Sold

22913. Nov. 19, 1919. Farmers National Bank, Bloomsburg, Pa.	\$3,500	5 1/2 %
22914. Nov. 11, 1919. Metuchen National Bank, Metuchen, N. J.	\$2,500	"
22915. Nov. 11, 1919. Wernersville Natl. Bk., Wernersville, Pa.	\$5,000	"
22916. Nov. 11, 1919. Safe Deposit & Trust Co., Newcastle, Pa.	\$5,000	"
	<hr/>	
	16,000	

#1—B

January 7, 1920, \$16,000, due March 9, 1920 6%

Notes Nos. #	
23217	\$5,000
23218	2,500
23219	2,500
23220	2,500
23221	3,500

[fol. 411] By check of Girard National Bank, Phila., #1034, to order of "Due Bill order Banks",

\$15,814 67

Transaction A—Continued

Sold

23217. Jan. 7, 1920. Keystone National Bank, Manheim, Pa.	5,000	6%
23218. Jan. 8, 1920. Lambertville Natl. Bank, Lambertville, Pa.	2,500	6
23219. Jan. 8, 1920. First National Bank, Hightstown, N. J.	2,500	6
23220. Jan. 8, 1920. First National Bank, Hightstown, N. J.	2,500	6
23221. Jan. 8, 1920. Natl. Bank of Delaware, Wilmington, Del.	3,500	6
	<hr/>	
	16,000	

#1—C

March 9, 1920, \$15,200, due May 7, 1920

7%

Notes Nos.	23496	\$5,000
	23497	5,000
	23498	2,500
	23499	2,700

By check of First Natl. Bank, Phila. #4200 to order of "Due Bills order Banks"..... \$28,695.47
 Amount included against above (See distribution on back of check)..... \$15,006.62

Sold

23496. Mar. 10, 1920. Corn Exchange Natl. Bank, Philadelphia, Pa.	5,000	7%
23497. Mar. 11, 1920. Bank of Old Fort, Old Fort, N. C.	5,000	7
23498. Mar. 9, 1920. Keystone Natl. Bank, Manheim, Pa.	2,500	7
23499. Mar. 11, 1920. Bank of Belton, Belton, S. C.	2,700	7
	<hr/>	
	15,200	

#1-D

May 7, 1920, \$9,000, due June 6, 1920..... 7¼ %

Notes Nos. 22655	\$2,500
22656	2,500
22657	4,000

By check of Girard Natl. Bank, Phila. #1315 to order of "Due Bill Order Banks"..... \$8,930.75

Said

22655. May 10, 1920. Franklin National Bank, Phila.	\$2,500	7¼ %
22656. May 10, 1920. Franklin National Bank, Phila.	2,500	7¼ %
22657. May 10, 1920. Franklin National Bank, Phila.	4,000	7¼ %
	<hr/>	
	9,000	

(Transaction B)

#2-A

November 13, 1919, \$19,300, due January 12, 1920..... 5½ %

Notes Nos. 22927	\$5,000
22928	5,000
22929	2,500
22930	2,500
22931	4,300

Transaction B—Continued

By check of Bank of North America, Phila. # 114 to order of "New York Draft Phila. Warehouse Co."

\$19,098.96

Sold

22927. Nov. 17, 1919. Lehigh National Bank, Catasauqua, Pa. 5,000 5½%
 22928. Nov. 17, 1919. National Bank of Slatington, Slatington, Pa. 5,000 5½%

[fol. 413]

Sold

22929. Nov. 13, 1919. First National Bank, Oley, Pa. 2,500 5½%
 22930. Nov. 17, 1919. Broad Street Natl. Bank, Trenton, N. J. 2,500 5½%
 22931. Nov. 17, 1919. Broad Street Natl. Bank, Trenton, N. J. 4,300 5½%

19,300

#2—B

January 12, 1920, \$11,300, due March 12, 1920

6%

Notes Nos. 23238

\$5,000

23239

2,500

23240

2,500

23241

1,300

By check of First National Bank, Phila. #4094 to order of "Due Bill Order Banks"

\$11,172.88

Rec'd

23238.	Jan. 19, 1920.	National Bank of Topton, Topton, Pa.	\$5,000	6%
23239.	Jan. 22, 1920.	City National Bank, Griffin, Ga.	2,500	6
23240.	Jan. 13, 1920.	Wernersville Natl. Bank, Wernersville, Pa.	2,500	6
23241.	Jan. 13, 1920.	First National Bank, Schaefferstown, Pa.	1,300	6
			<hr/>	
			11,300	

#2-C

Mar. 12, 1920, \$11,000, due May 11, 1920 7%

Notes Noa. 23508	\$5,000
23509	2,500
23510	3,500

[fol. 414] By check of Girard National Bank, Phila. #1187 to order of "Due Bill Order Banks"

\$10,857.92

Rec'd

23508.	Mar. 12, 1920.	Franklin National Bank, Philadelphia, Pa.	\$5,000	7%
23509.	Mar. 13, 1920.	Glen Rock State Bank, Glen Rock, Pa.	2,500	7
23510.	Mar. 12, 1920.	Franklin National Bank, Phila., Pa.	3,500	7
			<hr/>	
			\$10,000	

Transaction B—Continued

#2—D

May 11, 1920, \$10,000, due July 9, 1920. 7¼%

Notes Nos. 23667	\$1,000
23668	2,000
23669	2,500
23670	4,500

By check of Bank of North America, Phila. #330 to order of "Due Bill Order Banks" . . . \$9,868.68

Sold

23667. May 11, 1920. Edith Edwards, Philadelphia, Pa.	\$1,000	7¼%
23668. May 11, 1920. Edwards S. Dunn, Agent, Philadelphia, Pa.	2,000	7¼
23669. May 11, 1920. Girard National Bank, Philadelphia, Pa.	2,500	7¼
23670. May 11, 1920. Franklin National Bank, Philadelphia, Pa.	4,500	7¼

10,000

[fol. 415]

(Transaction E)

#5—A

December 31, 1919, \$36,000, due March 2, 1920 6%

Notes Nos. 23178	\$5,000
23179	5,000

23180	5,000
23181	5,000
23182	2,500
23183	2,500
23184	2,500
23185	2,500
23186	2,500
23187	3,500

By check of First National Bank, Phila. # 4073 to order of "New York Draft Phila.
Warehouse Co.,"

\$35,583 00

Sold

23178. Jan. 2, 1920.	First National Bank, Havre de Grace, Md.	5,000	6%
23179. Dec. 31, 1919.	Natl. Bank of Coatesville. Coatesville, Pa.	5,000	6
23180. Jan. 9, 1920.	Nat. Bank of Slatington, Slatington, Pa.	5,000	6
23181. Dec. 31, 1919.	Merchants Trust Co., Chester, Pa.	5,000	6
23182. Jan. 2, 1920.	Cumberland Natl. Bank, Bridgeton, N. J.	2,500	6
23183. Jan. 3, 1920.	First Natl. Bank, Clifton Heights, Pa.	2,500	6
23184. Jan. 3, 1920.	First Natl. Bank, Elmer, N. J.	2,500	6
23185. Jan. 3, 1920.	First Natl. Bank, Elmer, N. J.	2,500	6
23186. Dec. 31, 1919.	Second Natl. Bank, Nazareth, Pa.	2,500	6
23187. Jan. 2, 1920.	Cumberland Natl. Bank, Bridgeton, N. J.	3,500	6
		36,000	

(Transaction E)—Continued

[fol. 416]

#5—B

March 2, 1920, \$35,000, due May 3, 1920..... 7%

Notes Nos.	
23455	\$5,000
23456	5,000
23457	5,000
23458	5,000
23459	5,000
23460	2,500
23461	2,500
23462	2,500
23463	2,500

By check of Girard National Bank, Phila. #1155 to order of "Due Bill Order Banks"..... \$34,534 30

Sold

23455.	Mar. 16, 1920.	Union National Bank, Wilmington, Del.	5,000	7%
23456.	Mar. 16, 1920.	Union National Bank, Wilmington, Del.	5,000	7
23457.	Mar. 16, 1920.	Union National Bank, Wilmington, Del.	5,000	7
23458.	Mar. 16, 1920.	Union National Bank, Wilmington, Del.	5,000	7
23459.	Mar. 13, 1920.	Natl. Bank of Delaware, Wilmington, Del.	5,000	7
23460.	Mar. 4, 1920.	Harleysville, Nat. Bank, Harleysville, Pa.	2,500	7
23461.	Mar. 3, 1920.	Keystone Natl. Bank, Manheim, Pa.	2,500	7
23462.	Mar. 3, 1920.	Cumberland Natl. Bank, Bridgeton, N. J.	2,500	7

23463. Mar. 3, 1920. Cumberland Natl. Bank, Bridgeton, N. J. 2,500 7

[fol. 417]

#5—C

May 3, 1920. \$27,000, due June 2, 1920	7 1/4 %
Notes Nos. 23632	5,000
23633	5,000
23634	5,000
23635	2,500
23636	2,500
23637	2,500
23638	2,500
23639	2,000

By check of Bank of North America, Phila. #316 to order of "Due Bill Order Banks" \$26,803.12

Sold

23632. May 3, 1920. Farmers & Merchants Natl. Bank, Rockmart, Ga.	5,000 7 1/4 %
23633. May 4, 1920. Bordentown Banking Co., Bordentown, N. J.	5,000 7 1/4
23634. May 4, 1920. Bordentown Banking Co., Bordentown, N. J.	5,000 7 1/4
23635. May 5, 1920. Franklin National Bank, Phila., Pa.	2,500 7 1/4
23636. May 5, 1920. Franklin National Bank, Phila., Pa.	2,500 7 1/4
23637. May 3, 1920. Second National Bank, Mechanicsburg, Pa.	2,500 7 1/4
23638. May 3, 1920. Brownstown Natl. Bank, Brownstown, Pa.	2,500 7 1/4
23639. May 5, 1920. Franklin National Bank, Phila., Pa.	2,000 7 1/4

27,000

(Transaction F)

#6—A

January 6, 1920, \$5,700, due March 5, 1920..... 6%

Notes Nos. 23200..... \$2,500
23201..... 3,200

[fol. 418] By check of First National Bank, Phila. #4084 to order of "Due Bill Order Banks", \$5,636.83

Sold

23200. Jan. 6, 1920. First National Bank, Lansford, Pa. \$2,500 6%
23201. Jan. 6, 1920. New Tripoli National Bank, New Tripoli, Pa. 3,200 6

\$5,700

#6—B

March 5, 1920, \$5,000, due May 4, 1920..... 7%

Note No. 23487..... \$5,000

Purchased with check of Girard National Bank, Phila. #1163 to order of "Due Bill Order Banks", \$4,935.42

Sold

23487. Mar. 8, 1920. Merchants & Planters Bank, Griffin, Ga. \$5,000 7%

\$5,000

#6—C

May 4, 1920, \$4,500, due June 3, 1920 7¼%

Note No. 23647 \$4,500

By check of First National Bank, Phila. #4288 to order of "Due Bill Order Banks,"
for \$22,946.16 distribution on back of check shows amount of proceeds of this note of . . . \$4,467.19

Sold

23647. May 5, 1920. Telford National Bank, Telford, Pa. \$4,500 7¼%

\$4,500

[fol. 419]

46-B

(Transaction C)

No. 3963.

Philadelphia, Pa., 11/19/19.

First National Bank, 3-20, of Philadelphia, Pa.,

Pay to the order of Cashier's Check "Phila. Warehouse Co." \$8,405.20, eighty four hundred five dollars twenty cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

No. 1082.

Philadelphia, 1/20/20.

Girard National Bank

Pay to the order of Due Bill Order Banks Eighty-four hundred dollars thirteen cents \$8,400.13.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

[fol. 420]

(Transaction D)

No. 3964.

Philadelphia, Pa., 11/19/19.

First National Bank, 3-20, of Philadelphia, Pa.,

Pay to the order of Cashier's Check "Phila. Warehouse Co." \$5,834.20, Fifty-eight hundred thirty-four dollars twenty cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

No. 1081.

Philadelphia, 1/20/20.

Girard National Bank

Pay to the order of Due Bill Order Banks Fifty-eight hundred thirty dollars sixty-seven cents, \$5,830.67.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

[fol. 421]

(Transaction A)

No. 3935.

Philadelphia, Pa., 11/8/19.

First National Bank, 3-20, of Philadelphia, Pa.,

Pay to the order of New York Draft "Phila. Warehouse Co." \$15,813.33, fifteen thousand eight hundred thirteen dollars thirty-three cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

No. 3936.

Philadelphia, Pa., 11/8/19.

First National Bank, 3-20, of Philadelphia, Pa.,

Pay to the order of Cash Twenty Dollars, \$20.00.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

[fol. 422] No. 1034.

Philadelphia, 1/7/20.

Girard National Bank

Pay to the order of Due Bill Order Banks fifteen thousand eight hundred fourteen dollars sixty-seven cents. \$15,814.67.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

No. 4200.

Philadelphia, Pa., 3/9/20.

First National Bank, 3-20, of Philadelphia, Pa.,

Pay to the order of Due Bills Order Banks \$28,695.47, twenty-eight thousand six hundred ninety-five dollars forty-seven cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

[fol. 423] No. 1315.

Philadelphia, 5/7, 1920.

Girard National Bank

Pay to the order of Due Bill Order Banks eighty-nine hundred thirty dollars seventy-five cents, \$8,930.75.

S. B. Lewis & Co. E. H. Cockrill, Secretary.
S. B. Lewis & Co., Commercial Paper.

(Transaction B)

S. B. Lewis & Co., Commercial Paper

No. 114.

Philadelphia, 11/13/19.

Pay to the order of New York Draft Phila. Warehouse Co. \$19,098.96, nineteen thousand ninety-eight dollars ninety-six cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

To the Bank of North America, a National bank chartered by Continental Congress in 1781, Philadelphia, Pa., 3-2.

[fol. 424] No. 4094.

Philadelphia, Pa., 1/12/20.

First National Bank, 3-20, of Philadelphia, Pa.,

Pay to the order of Due Bill Order Banks \$11,172.88, eleven thousand one hundred seventy-two dollars eighty-eight cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

No. 1187.

Philadelphia, 3/12/20.

Girard National Bank

Pay to the order of Due Bill Order Banks ten thousand eight hundred fifty-seven dollars ninety-two cents, \$10,857.92.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

[fol. 425] S. B. Lewis & Co., Commercial Paper

No. 330.

Philadelphia, 5/11, 1920.

Pay to the order of Due Bill Order "Banks" \$9,868.68, ninety-eight hundred sixty-eight dollars sixty-eight cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

To the Bank of North America, a National bank chartered by Continental Congress in 1781, Philadelphia, Pa., 3-2.

(Transaction E)

No. 4073. Philadelphia, Pa., 12/31/19.

First National Bank of Philadelphia, Pa., 3-20

Pay to the order of New York Draft "Phila. Whse. Co." \$35,583.00, thirty-five thousand five hundred eighty-three dollars.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

[fol. 426] No. 1155. Philadelphia, 3/2/20.

Girard National Bank

Pay to the order of Due Bill Order Banks thirty-four thousand five hundred thirty-four dollars thirty cents, \$34,534.30.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

No. 316. Philadelphia, 5/3, 1920.

S. B. Lewis & Co., Commercial Paper

Pay to the order of Due Bill Order Banks \$26,803.12, twenty-six thousand eight hundred three dollars twelve cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

To the Bank of North America, a National bank chartered by Continental Congress in 1781, Philadelphia, Pa., 3-2.

[fol. 427] (Transaction F)

No. 4084. Philadelphia, Pa., 1/6/20.

First National Bank, of Philadelphia. Pa., 3-20,

Pay to the order of Due Bill Order Banks \$5,636.83, fifty-six hundred thirty-six dollars eighty-three cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

No. 1163. Philadelphia, 3/5/20.

Girard National Bank

Pay to the order of Due Bill Order Banks forty-nine hundred thirty-five dollars forty-two cents, \$4,935.42.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

[fol. 428] No. 4288. Philadelphia, Pa., 5/4, 1920.

First National Bank, of Philadelphia. Pa., 3-20,

Pay to the order of Due Bills Order Banks \$22,946.16, twenty-two thousand nine hundred forty-six dollars sixteen cents.

S. B. Lewis & Co. E. H. Cockrill, Secretary.

S. B. Lewis & Co., Commercial Paper.

There are no endorsements upon the foregoing drafts except as follows:

3936 Frank H. Veith

4200 *15,006.62

9,766.35

3,922.50

28,695.47

4288 *4,467.19

4,169.37

14,309.60

22,946.16

*The items thus marked are those involved in this suit—See statements 46-A.

(Transactions C & D.)

S. B. Lewis & Company, Bankers, Commercial Paper, Philadelphia Bank Building, 421 Chestnut Street

National Rockland Bank of Roxbury, Boston, Mass. (Girard Nat'l Bk. Phila.
Philadelphia, November 20, 1912.

Disassembled from — 11/20.

Promisor	Payable	Maturity	Days	Rate	Discount	Amount	Proceeds
3-a #22972-3 = 2½ ea.							
288,750							
Phila. Warehouse Co.	Chase	Jan 20	61	5%	\$106.20	\$10,900	\$10,793.80
4-a #22973 \$5,900							

Here appears the following stamp:

The paper covered by this bill of sale is sold subject to repurchase by us on or before 11/22/12, solely in the event your credit checkings on same are unsatisfactory.

3a (The reference 3-A shows that the notes so marked are the notes #22972 and #22973, two of Plaintiff's Exhibits 41-42 as referred to in Plaintiff's Exhibit 41-C-d and Plaintiff's Exhibit 46-A-c.)

4a (The reference 4-A shows that the note so marked is the note #22973, Plaintiff's Exhibit 24 as referred to in Plaintiff's Exhibit 25 and 46-A-d.)

Also the following void reports of S. B. Lewis & Co., 421 Chestnut Street, Philadelphia, Pa., similar in all respects to the above report, except as follows and that they are payable at Girard National Bank, Philadelphia, and that their art proceeds differ:

[fol. 430]

(Page 1)

(Transaction C)

Date	Pay to	Philadelphia check number	Amount	Discussed from	Days	Rate	Post for
Dec. 6, 1919	National City Bank, Akron, O.	22274	\$1,500	Dec. 10, 1919	41	6	Dec. 10, 1919
Jan. 20, 1920	Windsor Trust Co., Wind- sor, Pa.	22277	5,000	Jan. 21, 1920	62	6	Jan. 22, 1920
Jan. 20, 1920	Maryland Nat'l Bank Phila., Pa.	22278	3,500	Jan. 21, 1920	62	6	Jan. 22, 1920

(Transaction D)

Jan. 20, 1920	Windsor Trust Co., Wind- sor, Pa.	22275	2,500	Jan. 21, 1920	62	6	Jan. 22, 1920
Jan. 20, 1920	Maryland Nat'l Bank, Phila., Pa.	22276	3,400	Jan. 21, 1920	62	6	Jan. 22, 1920

*Payable Girard National Bank, New York City.

(Transactions A)

Nov. 19, 1919	Farmers Nat'l Bank, Bloomsburg, Pa.	22913	3,500	Nov. 20, 1919	48	5½	Nov. 21, 1919
Nov. 11, 1919	Metuchen Nat'l Bank, Metuchen, N. J.	22914	2,500	Nov. 12, 1919	56	5½	Nov. 13, 1919
Nov. 11, 1919	Wernersville Nat'l Bank, Wernersville, Pa.	22915	5,000	Nov. 12, 1919	56	5½	Nov. 13, 1919
Nov. 11, 1919	Safe Deposit & Trust Co., New Castle, Pa.	22916	5,000	Nov. 12, 1919	56	5½	Nov. 13, 1919
Jan. 7, 1920	Keystone Nat'l Bank, Man- heim, Pa.	23217	5,000	Jan. 7, 1920	62	6	Jan. 8, 1919
Jan. 8, 1920	Lambertville Nat'l Bank, Lambertville, N. J.	23218	2,500	Jan. 9, 1920	60	6	Jan. 10, 1920
Jan. 8, 1920	First National Bank, Hightstown, Pa.	23219	2,500	Jan. 9, 1920	60	6	Jan. 10, 1920
Jan. 8, 1920	First National Bank, Hightstown, Pa.	23220	2,500	Jan. 9, 1920	60	6	Jan. 10, 1920
Jan. 8, 1920	Nat'l Bank of Delaware, Wilmington, Del.	23221	2,500	Jan. 9, 1920	60	6	Jan. 10, 1920

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(Page 2)

Mar. 10, 1920	Corn Exchange Nat'l Bank, Phila., Pa.	23496	\$5,000	Mar. 10, 1920	58	7	Mar. 10, 1920
Mar. 11, 1920	Bank of Old Fort, Old Fort, N. C.	23497	5,000	Mar. 18, 1920	50	7	Mar. 18, 1920

(Transaction A)—Continued

Date	Sold to	Phila. whse. note number	Amount	Discounted from	Days	Rate	Paid for
Mar. 9, 1920	Keystone Nat'l Bank, Manheim, Pa.	23498	2,500	Mar. 10, 1920	58	7	Mar. 11, 1920
Mar. 11, 1920	Bank of Belton, Belton, S. C.	23499	2,700	Mar. 17, 1920	51	7	Mar. 17, 1920
May 10, 1920	Franklin Nat'l Bank, Phila., Pa.	23655	2,500	May 10, 1920	29	7 1/4	May 10, 1920
May 10, 1920	Franklin Nat'l Bank, Phila., Pa.	23656	2,500	May 10, 1920	29	7 1/4	May 10, 1920
May 10, 1920	Franklin Nat'l Bank, Phila., Pa.	23657	4,000	May 10, 1920	29	7 1/4	May 10, 1920

(Transaction B)

Nov. 17, 1919	Lehigh Nat'l Bank, Cata- sauque, Pa.	22927	5,000	Nov. 18, 1919	55	5 1/2	Nov. 19, 1919
Nov. 17, 1919	Nat'l Bank of Slatington, Slatington, Pa.	22928	5,000	Nov. 18, 1919	55	5 1/2	Nov. 19, 1919
Nov. 13, 1919	First Nat'l Bank, Oley, Pa.	22929	2,500	Nov. 14, 1919	59	5 1/2	Nov. 15, 1919
Nov. 17, 1919	Broad St. Nat'l Bank, Phila., Pa.	22930	2,500	Nov. 18, 1919	55	5 1/2	Nov. 19, 1919
Nov. 17, 1919	Broad St. Nat'l Bank, Phila., Pa.	22931	4,300	Nov. 18, 1919	55	5 1/2	Nov. 19, 1919

Jan. 19, 1920	Nat'l Bk. of Tipton, Top- ton, Pa.	23238	5,000	Jan. 20, 1920	53	6	Jan. .., 1920
Jan. 22, 1920	City Nat'l Bk., Griffin, Ga.	23239	2,500	Jan. 22, 1920	50	6	Jan. 27, 1920
Jan. 13, 1920	Wernersville Nat'l Bk., Wernersville, Pa.	23240	2,500	Jan. 14, 1920	58	6	Jan. 15, 1920
Jan. 13, 1920	First National Bank, Schaefferstown, Pa. ...	23241	1,300	Jan. 16, 1920	57	6	Jan. 19, 1920
[fol. 432] (Page 3)							
Mar. 12, 1920	Franklin Nat'l Bank, Phila., Pa.	23508	\$5,000	Mar. 12, 1920	49	7	Mar. 12, 1920
Mar. 13, 1920	Glen Rock State Bk., Glen Rock, Pa.	23509	2,500	Mar. 15, 1920	57	7	Mar. 16, 1920
Mar. 12, 1920	Franklin Nat'l Bk., Phila., Pa.	23510	3,500	Mar. 12, 1920	49	7	Mar. 12, 1920
May 11, 1920	Edith Edwards, Phila., Pa.	23667	1,000	May 11, 1920	59	7 1/4	May 11, 1920
May 11, 1920	E. S. Dunn, Agent, Phila., Pa.	23668	2,000	May 11, 1920	59	7 1/4	May 11, 1920
May 11, 1920	Girard Nat'l Bank, Phila., Pa.	23669	2,500	May 11, 1920	59	7 1/4	May 11, 1920
May 11, 1920	Franklin Nat'l Bank, Phila., Pa.	23670	4,500	May 11, 1920	59	7 1/4	May 11, 1920

(Transaction E)

Date	Sold to	Phila. whse. note number	Amount	Discounted from	Days	Rate	Paid for
Jan. 2, 1920	First Nat'l Bank, Havre de Grace, Md.	23178	5,000	Jan. 4, 1920	58	6	Jan. 5, 1920
Dec. 31, 1919	Nat'l Bk. of Coatesville, Coatesville, Pa.	23179	5,000	Jan. 2, 1920	60	6	Jan. 2, 1920
Jan. 9, 1920	Nat'l Bk. of Slatington, Slatington, Pa.	23180	5,000	Jan. 9, 1920	51	6	Jan. 12, 1920
Dec. 31, 1920	Merchants Trust Co., Chester, Pa.	23181	5,000	Jan. 2, 1920	60	6	Jan. 5, 1920
Jan. 2, 1920	Cumberland Nat'l Bk., Bridgeton, N. J.	23182	2,500	Jan. 2, 1920	60	6	Jan. 5, 1920
Jan. 3, 1920	First Nat'l Bk, Clifton Heights, Pa.	23183	2,500	Jan. 5, 1920	57	6	Jan. 5, 1920
Jan. 3, 1920	First Nat'l Bk., Elmer, N. J.	23184	2,500	Jan. 5, 1920	57	6	Jan. 5, 1920
Jan. 3, 1920	First Nat'l Bk., Elmer, N. J.	23185	2,500	Jan. 5, 1920	57	6	Jan. 5, 1920
Dec. 31, 1919	Second Nat'l Bk., Naza- reth, Pa.	23186	2,500	Jan. 2, 1920	60	6	Jan. 3, 1920

[fol. 433]

(Page 4)

Jan. 2, 1920	Cumberland Nat'l Bk., Bridgeton, N. J.	23187	\$3,500	Jan. 2, 1920	60	6	Jan. 5, 1920
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Mar. 16, 1920	Union National Bank, Wil- mington, Del.	23455	5,000	Mar. 17, 1920	47 7	Mar. 18, 1920
Mar. 16, 1920	Union National Bank, Wil- mington, Del.	23456	5,000	Mar. 17, 1920	47 7	Mar. 18, 1920
Mar. 16, 1920	Union National Bank, Wil- mington, Del.	23457	5,000	Mar. 17, 1920	47 7	Mar. 18, 1920
Mar. 16, 1920	Union National Bank, Wil- mington, Del.	23458	5,000	Mar. 17, 1920	47 7	Mar. 18, 1920
Mar. 13, 1920	Nat'l Bank of Delaware, Wilmington, Del.	23459	5,000	Mar. 12, 1920	52 7	Mar. 15, 1920
Mar. 9, 1920	Harleysville Nat'l Bank, Harleysville, Pa.	23460	2,500	Mar. 8, 1920	56 7	Mar. 11, 1920
Mar. 3, 1920	Keystone National Bank, Manheim, Pa.	23461	2,500	Mar. 4, 1920	60 7	Mar. 4, 1920
Mar. 3, 1920	Cumberland Nat'l Bank, Bridgeton, N. J.	23462	2,500	Mar. 3, 1920	61 7	Mar. 5, 1920
Mar. 3, 1920	Cumberland Nat'l Bank, Bridgeton, N. J.	23463	2,500	Mar. 3, 1920	61 7	Mar. 5, 1920
May 3, 1920	Farmers & Merchants Nat'l Bk., Rockmart, Ga.	23632	5,000	May 7, 1920	26 7¼	May 8, 1920
May 4, 1920	Bordentown Banking Co., Bordentown, N. J.	23633	5,000	May 5, 1920	28 7¼	May 6, 1920
May 4, 1920	Bordentown Banking Co., Bordentown, N. J.	23634	5,000	May 5, 1920	28 7¼	May 6, 1920
May 5, 1920	Franklin National Bank, Philadelphia, Pa.	23635	2,500	May 5, 1920	28 7¼	May 5, 1920

(Transaction E)—Continued

Date	Sold to	Phila. whse. note number	Amount	Discounted from	Days	Rate	Paid for
May 5, 1920	Franklin National Bank, Philadelphia, Pa.	23536	2,500	May 5, 1920	28	7¼	May 5, 1920
May 5, 1920	Franklin National Bank, Philadelphia, Pa.	23639	2,000	May 5, 1920	28	7¼	May 5, 1920

[fol. 434]

(Page 5)

May 3, 1920	Second National Bank, Mechanicsburg, Pa. ...	23637	\$2,500	May 4, 1920	29	7¼	May 5, 1920
May 3, 1920	Brownstown Nat'l Bank, Brownstown, Pa.	23638	2,500	May 4, 1920	29	7¼	May 6, 1920

(Transaction F)

Jan. 6, 1920	First National Bank, Lansford, Pa.	23200	2,500	Jan. 7, 1920	58	6	Jan. 9, 1920
Jan. 6, 1920	New Tripoli Nat'l Bank, New Tripoli, Pa.	23201	3,200	Jan. 7, 1920	58	6	Jan. 8, 1920
Mar. 8, 1920	Merchants & Planters Bank, Griffin, Ga.	23487	5,000	Mar. 10, 1920	55	7	Mar. 10, 1920
May 5, 1920	Telford National Bank, Telford, Pa.	23647	4,500	May 6, 1920	28	7¼	May 7, 1920

[fol. 435]

46-D

S. B. Lewis & Co.'s reports delivered to Philadelphia Warehouse Co.

These reports are duplicates of Plaintiff's Exhibits 25, 31-C and 41-E.

PLAINTIFF'S EXHIBIT 47

Trucking record No. 7178 dated 11/21/19 of Yorke Trucking Co., showing receipt by that Company from New York Central Railroad Pier 16, of 999 cases Boy Blue Canned Salmon ex Car GN 19997 and the delivery of said cases of canned salmon at the warehouse of the Yorke Warehouse & Storage Co. Inc., and showing 1 case short out of 1000 cases.

PLAINTIFF'S EXHIBIT 48

Telephone Spring 1938

Yorke Storage & Warehouse Co., 686-688-690 Greenwich Street

No. 952.

New York, Feby. 20/1920.

697-701

Received on Storage at [686-688-690]* Greenwich Street for account and risk of M. Seeman Brothers, Hudson & North Moore St. Nine hundred ninety-nine (999) cases, said to contain Pink Salmon quality, quantity and condition of contents unknown, and deliverable to same on payment of all charges subject to the conditions printed below.

Yorke Storage & Warehouse Co., per Jas. Polito.
[fol. 436] Storage: 3/3c. ea. per month.

Labor: —.

Advanced charges: —.

(Usual conditions re loss by fire, etc.)

Marks and numbers: Ex Coccoaro's Boy Blue #1 Tall. Storage expires Feby. 28/1920. 1 case 6 cans short. 1 case 22 cans short. 21 cans taken out as samples.

Non-negotiable is printed in red ink across face of foregoing receipt.

[*Erased in copy.]

PLAINTIFF'S EXHIBIT 49

Jan. 5, 1920.

General ledger	Com. & Int. Food Dept. to A. U. Surprenant		Accts. pay. (creditors)
1213 86.	1/2 on 36,000	720.00	1,213 86
	1/2 on 6,000	60.00	
	on 7,564	75.64	
	on 14,451	72.25	
	1/5 on 2,053.96	51.77	
	1/5 on 7,620.00	175.20	
	9,900.00		
	1/5 on 5,000.00	59.00	
		<hr/>	
		1,213.86	

[fol. 437]

PLAINTIFF'S EXHIBIT 50

A. J. Coccaro & Co.'s bound ledger (pages 57-58) showing their account with International Credit Trust during the year 1919, consisting of 36 entries, totaling \$116,679.68 on the Debit side, and 57 entries, totaling \$179,431.43 on the Credit side, and covering the period of Oct. 16, 1919 to Dec. 31, 1919, both inclusive.

PLAINTIFF'S EXHIBIT 51

A. J. Coccaro & Co.'s 1919 ledger entries (page S 72) showing their account with A. U. Surprenant & Co. during the year 1919, consisting of 52 entries (including "Dec. 31 Bal., 1920 Ledger \$1,377.34") totaling \$10,651.00, on the Debit side, and 65 entries, totaling \$10,651.00 on the Credit side, and covering the period of Oct. 29, 1919 to Dec. 31, 1919, both inclusive.

PLAINTIFF'S EXHIBIT 52

A. J. Coccaro & Co.'s 1920 ledger entries (page S 3) showing their account with A. U. Surprenant, during the year 1920, consisting of 27 entries, totaling \$3,967.90 on the Debit

side, and 40 entries (including "Jan. 1 Bal., 1919 Ledger \$1,377.34") totaling \$8,141.11 on the Credit side, and covering the period of Jan. 1, 1920 to Apr. 9, 1920, both inclusive.

[fol. 438]

PLAINTIFF'S EXHIBIT 53

No. 19.

New York, Feb. 26, 1920.

The Bronx National Bank of New York, 1-4-16

Pay to the order of A. J. Coccaro & Co. \$1,488.50, fourteen hundred eighty-eight dollars fifty cents.

A. J. Coccaro & Co., Special. A. U. Surprenant, Attorney.

Endorsed: A. J. Coccaro & Co. Pay to order of the Larchmont National Bank, Larchmont, N. Y. A. U. Surprenant & Co., Inc. Pay to First National Bank New York, N. Y., or order. The Larchmont National Bank, 57-776, Larchmont, N. Y., 50-776. James S. Dowling, Cashier. Received payment through city collection dept. of the Federal Reserve Bank of N. Y. Mar. 1, 1920. First National Bank.

[fol. 439]

DEFENDANTS' EXHIBIT A

Letterhead of A. J. Coccaro & Company

New York, January 7, 1920.

Philadelphia Warehouse Company, Third & Chestnut Streets, Philadelphia, Pa.

GENTLEMEN: We enclose herewith our check for \$271.20 and document duly signed for extension on our loan of \$16,000.

You will kindly pardon this slight delay due to the illness of our bookkeeper for the last few days.

Thanking you sincerely for your usual courtesy in this matter, we are

Yours very truly, A. J. Coccaro & Co.

AJC/TP.

STATEMENT RE DEFENDANT EXHIBIT B

(This report is also Plaintiff's Exhibit 41-D-a and is there printed.)

STATEMENT RE DEFENDANTS' EXHIBIT C

(This pledge contract is also Plaintiff's Exhibit 41-A-a and is there printed.)

STATEMENT RE DEFENDANTS' EXHIBIT D

(This order is also Plaintiff's Exhibit 41-B-a and is there printed.)

[fol. 440] STATEMENT RE DEFENDANTS' EXHIBIT E

(Erroneously marked "Plaintiff's Exhibit 54".)

Transcript of Book of Irving National Bank, New York City, showing account of A. J. Coccaro & Co. for Jan. 2, 1920, and containing entry showing payment of a check for \$720 on Jan. 5, 1920.

DEFENDANTS' EXHIBIT F

Agreement made this 22nd day of October, 1919, by and between Anthony J. Coccaro and Joseph J. Coccaro, both of the city of New York, copartners, doing business under the firm name and style of A. J. Coccaro & Co., parties of the first part, and A. U. Surprenant & Co., Inc., a corporation organized and existing under and by virtue of the laws of the State of New York, party of the second part.

Whereas, the parties of the first part have contracted for the purchase of certain canned fruits, salmon and dried fruits from the California Fruit Growers Association, copies of which contracts are hereto attached, and,

Whereas, the parties of the first part have contracts for the sale of said canned fruit, etc., and,

Whereas, the parties of the first part are obliged to pay for said merchandise on bills-of-lading attached at the time of the arrival of same in the City of New York, and

Whereas, the party of the second part caused the Industrial Finance Corporation to enter into an arrangement with the parties of the first part to finance the purchase of said merchandise to the extent of eighty (80%) per cent. [fol. 441] of the purchase price of said merchandise, on condition that such loans or advances should not at any time exceed the sum of Fifty thousand (\$50,000.) dollars, and

Whereas, the parties of the first part are desirous of arranging for loans or advances amounting to the remaining twenty (20%) per cent. of the purchase price of the said merchandise so to be purchased by the parties of the first part.

Now, therefore, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows:

1. The parties of the first part hereby employ the party of the second part as their financial agent in connection with the financing of the transaction herein referred to.

2. The party of the second part agrees to procure the Bronx National Bank to make loans to the party of the first part amounting to twenty (20%) per cent. of the purchase price of the merchandise so to be purchased.

3. The party of the second part agrees to procure the International Credit Trust to guarantee to the Bronx National Bank the repayment of any loans made by it to the parties of the first part on the following terms and conditions:

- (a) The parties of the first part do hereby transfer and assign to the International Credit Trust all their right, title and interest in and to their equity in any moneys due or to become due from the Industrial Finance Corporation.

- (b) The parties of the first part do hereby agree to open [fol. 442] an account in the Bronx National Bank, to be known as "A. J. Coccaro Special," and do hereby agree to authorize and direct the said Bronx National Bank to permit withdrawals from said account only on the signature of Albert U. Surprenant or Fred S. Sells.

(c) The parties of the first part do hereby, by appropriate instrument in writing, authorize and direct the Industrial Finance Corporation to pay any and all moneys that may become due them to the Bronx National Bank for deposit in their account known as "A. J. Coccaro Special."

(d) The parties of the first part further agree to execute promissory notes in form prescribed by the party of the second part of any loans that may be procured from the Bronx National Bank.

(e) The parties of the first part further agree to assign, transfer and set over unto the International Credit Trust a certain open account now existing against Reannle Webb & Co., of Glasgow, Scotland, now amounting to the sum of approximately Forty-five thousand (\$45,000.) dollars, and the parties of the first part and each of them severally undertake to act as agent and attorney for the said International Credit Trust in the collection of said account against Renanle, Webb & Co., and said parties of the first part do hereby agree to deliver over to said International Credit Trust any and all original remittances or credits [fol. 443] received on account of said amount due by Renanle, Webb & Co.

4. It is understood and agreed by and between the respective parties hereto that Albert U. Surprenant and Fred S. Sells will draw checks on the account of "A. J. Coccaro Special" for the benefit of the International Credit Trust on account of moneys due it or which may hereafter become due it on account of indorsements on notes made by the parties of the first part, it being understood that said account is created for the benefit of said International Credit Trust and all moneys therein deposited shall be held as collateral security for any and all sums due the International Credit Trust or which may hereafter become due it, and that no checks will be drawn on said account except to the International Credit Trust or to the party of the second part on account of compensation for services rendered, as is hereinafter agreed upon.

5. The party of the second part is to receive as compensation for its services in connection with services rendered by it in procuring said loans and on account of any moneys paid to the International Credit Trust for their indorsement on account of said loans, the sum of one and one-half

(1½%) per cent. on the original line of credit obtained from the Industrial Finance Corporation, amounting to the sum of Fifty thousand (\$50,000.) dollars each and every year plus one-half of one (½%) per cent. on all sums of money advanced by said Industrial Finance Corporation, or renewals or extensions thereof together with thirty (30%) per cent. of the gross profit accruing from the purchase and sale of the merchandise hereinafter referred to, it being understood that the party of the second part shall see [fol. 444] receive a sum amounting to not less than Three thousand (\$3,000.) dollars on account of such gross profits, it being understood that gross profits shall be deemed to be the difference between the net amount paid for the merchandise and the net amount received from the sale of said merchandise by the parties of the first part.

6. It is further understood and agreed that the parties of the first part shall give to the party of the second part five (5) days notice of its requirements for any loans to be made in connection with the purchase of the merchandise herein referred to.

7. The parties of the first part represent to the party of the second part and to the International Credit Trust that their financial condition as shown by their books on June 30, 1919, is set forth in a financial statement dated on that date and delivered to the party of the second part at the time of the execution of this contract.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

A. F. Szymanski & Co., Inc. P. S. Sells, Pres. A.
J. Curran & Co.

City of New York,

County of New York, ss:

On this 21st day of October, 1919, before me personally came A. J. Curran to me known and known to me to be the [fol. 445] individual mentioned and described in the foregoing instrument, who acknowledged to me that he executed the same.

Charles A. Davidson, Notary Public N. Y. Co., 2228.

CITY OF NEW YORK,
County of New York, ss:

On this 21st day of October 1919, before me personally came Fred S. Sells, to me known and known to me to be the President of A. U. Surprenant & Co. Inc., who acknowledged to me that he executed the foregoing instrument by the direction of the Board of Directors of said A. U. Surprenant & Co. Inc.

Charles A. Davidson, Notary Public N. Y. Co., #233.

[fol. 446] DEFENDANT'S EXHIBIT G

No. 10175.

New York, May 3, 1920.

Irving National Bank, New York

Pay to the order of Phila. Warehouse Co. two hundred sixty-nine dollars seventy-eight cents, \$269.78.

A. J. Coccoaro & Co.

Through New York Clearing House.

A. J. Coccoaro & Co., 1 Broadway.

Endorsements: This check is in payment of the following items: If not correct, kindly return. Pay to the order of the Girard National Bank for collection. Philadelphia Warehouse Co. Pay to the order of any bank or trust Co. All prior endorsements guaranteed. May 4, 1920. Girard National Bank, 3-13, Phila., 3-13. Charles M. Ashton, Cash. Received payment through New York Clearing House Mail Department May 5, 1920. The Chemical National Bank of New York. No. 12.

[fol. 447] DEFENDANTS' EXHIBIT H

Time loans on mdse. in any responsible warehouse at $\frac{1}{4}\%$ per month over lowest rate for best commercial paper. No rehypothecation of notes or mdse. No deposit balance to be maintained. Interest allowed on prepayments for releases of mdse.

Philadelphia Warehouse Company, 3rd & Chestnut Sts., Phila.

Capital \$1,000,000. Surplus \$1,000,000. Established 1873.

The foregoing Bill of Exceptions and the exhibits annexed thereto contain all the evidence introduced and testimony taken on the trial of this action.

STIPULATION RE EXHIBITS

We hereby stipulate that the foregoing constitute true copies of the exhibits to be printed in full in the record on appeal and the material portions of the exhibits that need not be printed in full in such record, and that any part of any exhibit or document offered in evidence on the trial of this action which is not printed in full may be referred to and used on the argument of the appeal herein, and, if so desired, such exhibit or document may be handed to the United States Circuit Court of Appeals for the Second Circuit on the argument hereof.

Dated, New York, Sept. 25, 1924.

Leventritt, Riegelman, Carns & Goetz, Attorneys for Plaintiff. Cohen, Cole & Weiss, Attorneys for Defendants.

[fol. 447a] The time of the plaintiff in error to file settled bill of exceptions was duly extended by orders entered herein as follows:

To Apr. 21, 1924, by order entered	Mar. 26, 1924.
“ May 12, “ “ “ “	Apr. 15, “
“ June 9, “ “ “ “	May 6, “
“ June 23, “ “ “ “	June 4, “
“ June 30, “ “ “ “	June 16, “
“ July 8, “ “ “ “	June 26, “
“ July 21, “ “ “ “	July 7, “
“ Sept. 10, “ “ “ “	July 21, “
“ Oct. 7, “ “ “ “	July 26, “

The return day of the citation on appeal was duly set over to Oct. 7, 1924, by order entered July 26, 1924, the notice of motion for such extension having been served July 18, 1924.

The foregoing page 447-a is hereby made a part of this bill of exceptions.

New York, Sept. 25, 1924.

Leventritt, Riegelman, Carbs & Goetz, Attorneys for
Plaintiff-in-Error. Cohen, Cole & Weiss, Attor-
neys for Defendant in Error.

[fol. 448] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

It is hereby ordered that the foregoing Bill of Exceptions, which contains all the evidence introduced on the trial of this action and copies of all exhibits to be printed in full in the record on appeal and the material portions of the exhibits that need not be printed in full in such record, be and the same is hereby settled as the Bill of Exceptions herein, and the foregoing B. of Exceptions is hereby ordered to be filed in the office of the Clerk of the United State District Court for the Southern District of New York.

Dated, New York, Oct. 1st, 1924.

Julian W. Mack, U. S. Circ. J.

We hereby consent to the entry of the foregoing order.

Dated, New York, Sept 25, 1924.

Leventritt, Riegelman, Carns & Goetz, Attorneys for
Plaintiff. Cohen, Cole & Weiss, Attorneys for
Defendants.

[fol. 449] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF NO OPINION

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
County of New York, ss:

Norman S. Goetz, being duly sworn, says I am one of the attorneys for the plaintiff-appellant herein and that no

opinion or memorandum was handed down by Mr. Justice Julian W. Mack in deciding the plaintiff's motion for new trial upon the minutes.

Norman S. Goetz.

Sworn to before me this 16th day of July, 1924. Arthur Watson, Notary Public, Rockland County. Certificate filed in New York County. New York County Clerk's No. 409. New York County Register's No. 5322. My commission expires Mar. 30, 1925.

[fol. 450] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—June 21, 1924

On reading and filing the annexed petition of the plaintiff by its attorneys praying for the allowance of a writ of error, and an assignment of errors intended to be urged by the plaintiff, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the Circuit Court of Appeals for the Second Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises, it is

[fol. 451] Ordered that this Court does allow the writ of error and that the bond for costs herein be waived.

Jno. C. Knox, United States District Judge.

Whereas the plaintiff has announced its intention to appeal from the judgment herein.

We consent that the filing of bond to secure payment of the costs upon appeal herein be waived.

Leventritt, Riegelman, Carns & Goetz, Attorneys for Plaintiff. Cohen, Cole & Weiss, Attorneys for defendants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

To the Honorable Justices of the District Court of the
United States for the Southern District of New York:

[fol. 452] The petition of Philadelphia Warehouse Co.,
the plaintiff herein, by its attorneys, Leventritt, Riegelman,
Carns & Goetz, respectfully shows:

That on the 31st day of December, 1923, this Court entered judgment in favor of the defendants and against the plaintiff dismissing the complaint herein as to all of the defendants with costs to them in the sum of Sixty-two and 60/100 (\$62.60) Dollars in which judgment and the proceedings had prior thereto certain errors were committed to the prejudice of the plaintiff all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals and that such other and further proceedings may be had as may be proper in the premises.

Leventritt, Riegelman, Carns & Goetz, Attorneys for
Plaintiff, 128 Broadway, Borough of Manhattan,
New York City.

[fol. 453] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The plaintiff in the above entitled action in connection with its petition for a writ of error assigns the following errors which it avers occurred upon the trial of this cause, to wit:

1. That the Trial Court error in excluding certain evidence offered by the plaintiff, to wit, the following portion of the letter of A. J. Coccaro & Co., to the plaintiff, dated March 20, 1920 (Plaintiff's Exhibit 33 for identification):

"We are beginning to move the Salmon; the market for which is showing every evidence of strength and have firm hope that within a very short time, we will be able to dispose of the entire quantity you are holding at advantageous prices."

by ruling as follows:

"Mr. Podell: I offer in evidence the letter shown to de-[fol. 454] fendants' counsel (handing paper to Mr. Frank).

"Mr. Frank: I object to that letter, except the statement in it that they asked for the extension of a loan. There are a great many other things in it.

"Mr. Podell: I do not care about the other things.

"Mr. Frank: I think the first paragraph ought to go in. I object to anything except what refers to this transaction.

"Mr. Podell: I would like to offer the first paragraph, and also the part which requests an extension (handing paper to the Court).

"Mr. Frank: I object to the other part of the letter.

"The Court: I sustain the objection.

"Mr. Podell: Your Honor will allow me an exception?

"The Court: Yes.

"Mr. Podell: Then, what will we do? Just mark it?

"The Court: Mark it for identification and read into the record the part which is admitted.

"(Paper marked Plaintiff's Exhibit No. 33 for Identification.)

"Mr. Podell: This is dated March 20, 1920, addressed to the Philadelphia Warehouse Company, and among other things, it says: 'In the meantime, we would ask for an extension of our loan for \$8,500 and \$5,900 due on the 23rd inst.' "

2. That the Trial Court erred in excluding certain evidence offered by the plaintiff, to wit, the account of the transactions between A. J. Coccaro & Company and the

[fol. 455] plaintiff contained in the plaintiff's ledger (Plaintiff's Exhibit 38 for Identification) by ruling as follows:

"Mr. Frank: Do you want to show that this is an authentic real book of the company?

"Mr. Podell: Yes.

"Mr. Frank: It is conceded.

"Q. Is that the ledger?

"A. Yes, that is, of the Philadelphia Warehouse Company.

"Q. Kept in the regular course of business?

"A. Yes.

"Q. Now, does that book contain the account of A. J. Coccaro with your concern, yes or no?

"A. It does.

"Q. And to your knowledge is that a true and correct statement of the account between your concern and Coccaro?

"Mr. Frank: I object to the question, inasmuch as this answer and this alleged account reflects a number of transactions of the same character of those which have been offered to the Court and jury already, consisting of a number of loans and a number of renewals, in which various items are questioned, and the witness's conclusion or the bookkeeper's conclusion as to what they show is not binding upon us.

"The Court: Sustained.

"Mr. Podell: I except. Will you mark it for identification, please?

"(Book marked Plaintiff's Exhibit No. 38 for Identification.)"

3. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and [fol. 456] exception of the plaintiff of transactions between the plaintiff and persons other than the defendants and A. J. Coccaro & Company (cross-examination of plaintiff's witness William P. Cosgrove), as follows:

"Q. Can you refresh your recollection by looking at page 83 of the record about the Philadelphia Warehouse Company splitting a commission on a loan with A. U. Surprenant & Co.?

"A. I do, in the case of De Lion Tire & Rubber Co.

"Q. And when was that?

"A. In November, 1919.

"Q. And that was not five years ago?

"A. No; I was in error.

"Mr. Podell: I move to strike out any evidence relating to that as having no bearing at all upon the transaction in suit. It is an entirely independent transaction, and we will have to try another case here.

"The Court: I think it has a bearing on the relations of these parties.

"Mr. Podell: I will take my exception.

"Q. Now, after looking at that item in November, 1919, do you recall any other case where the Philadelphia Warehouse Company about that period split commissions with A. U. Surprenant & Co. or A. U. Surprenant?

"A. I do not.

"Q. Did you keep any separate book or record of cases where commissions were split with a broker?

"A. None excepting what appears in the ledger under his name.

"Q. Have you got the ledger account with A. U. Surprenant & Co.?

"A. Probably.

[fol. 457] "Q. Will you see whether that item of the split commission appears in the ledger account?

"Mr. Podell: Are you talking now about the De Lion Tire & Rubber Company?

"Mr. Frank: Yes.

"The Witness: It does appear in the ledger.

"Q. May I see it, please?

"A. Yes (handing book to Mr. Frank).

"Q. Did you split your commission on the renewals of that account, with Surprenant likewise?

"Mr. Podell: Which account?

"Mr. Frank: The De Lion Tire & Rubber Company.

"The Witness: As far as I recall, we did.

"Q. I see. Was that a New York concern, the De Lion Tire & Rubber Company?

"A. It was not.

"Q. What is that?

"A. It was not.

"Q. Did you handle that transaction?

"A. I did.

"Q. And, according to this account, you made a payment in February, 1920, on account of splitting commissions with A. U. Surprenant?

"A. If that appears in the record, we did.

"Q. Well, just see if it does not appear.

"A. That is correct.

* * * * *

"Q. You testified before, I think, that on one occasion the Philadelphia Warehouse Company did give part of its commission to Surprenant. Is that the only occasion now that you recall?

"A. It is not.

[fol. 458] "Q. Well, what other occasions were there that you gave commissions to Surprenant, besides the one of the De Lion Rubber Company?

"A. There are three others.

"Q. When did you discover that?

"A. By refreshing my memory by looking through the books.

"Q. When did you do that?

"A. Just since the beginning of this trial, when you propounded those questions to me.

"Q. In connection with transactions of what other firms did you give Surprenant any money?

"A. C. M. Plowman & Co., in Philadelphia.

"Q. And when was that?

"A. May I refresh my memory from the books?

"Q. Do you not recall approximately by years?

"A. I would say 1919.

"Q. And what part of 1919?

"A. Both spring, summer, and I should say fall, too.

"Q. Now, neither the De Lion Rubber Company nor Plowman & Co. had any connection with A. J. Coccaro & Co. in any way, did they?

"A. They did not.

"Q. What other transactions have you refreshed your recollection as to?

"A. L. Laveson & Son, Philadelphia.

"Q. Any others?

"A. Union Stove Works.

"Q. Where were they?

"A. Peekskill, New York.

"Q. When did the Laveson transaction take place?

"A. I would judge in the early part of 1919.

"Q. When did the Peekskill transaction take place?

"A. I believe also in 1919.

"Q. And about the latter part of 1919, in October or [fol. 459] November, was it?

"A. I think that is correct.

"Q. Now, any others that you recall, please?

"A. I do not recall any others.

"Q. What book did you look at to discover those other transactions between the Philadelphia Warehouse Company and Surprenant?

"A. In the ledger book of the Philadelphia Warehouse Company.

"Q. Did you find any or do you recall any now about commission that you paid Surprenant about a motor company?

"A. I beg pardon?

"Mr. Frank: I withdraw the question.

"Q. Will you show us the book that you found these entries in, please?

"A. Yes.

"Q. Would you mind my looking at it?

"A. No, not at all.

"Q. I do not want to look at anything except the back with reference to page 421. That is all I want to see. What is the reference to Item 421, \$29.53 on February 18, 1920?

A. Bergougnan Rubber Corporation, which was the successor of the De Lion Tire and Rubber Company.

"Q. Do you recall any other case in which you personally had any transaction in which you paid any moneys to Mr. Surprenant?

"A. I do not recall any such."

4. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and exception of the plaintiff of the application of credits by the

plaintiff in favor of A. J. Coccaro & Company (Cross examination of Plaintiff's witness William P. Cosgrove) as follows:

[fol. 460] "Q. What system or method did you follow as to whether you credited that payment on the first, second or any other note of the series?"

"A. If the payment was made for collateral, it was applied on account of the note from which collateral was removed.

"Q. There was only one payment in the month of May where it was made on account of collateral, was there not—a payment?"

"A. I do not recall.

"Q. Well, just look at your records.

"Mr. Podell: I object to the question on the ground that it is well settled that a creditor has a right to make his applications in any manner he sees fit.

"The Court: Overruled.

"Mr. Podell: Exception.

"Mr. Frank: May I withdraw that question for a moment? I may lead up to it later."

* * * * *

"Q. Now, on May 20th you got a payment for \$3,700, did you, which was deposited to the Philadelphia Warehouse Company's account in the Chase National Banks? You can look at any of these books or papers that you want.

"A. If my memory serves me, I think that is correct.

"Q. Now, there was not any note due on May 20th, was there?"

"A. Not to my knowledge.

"Q. And you credited that to the second note, the note of \$19,300 is that right?"

"A. Just a moment, please.

"Q. Yes.

"Mr. Podell: That is all subject to the same objection [fol. 461] and exception, with your Honor's permission.

"The Court: Yes.

"The Witness: May I ask the amount of that?"

"Q. Yes. \$3,700 deposited in the Chase National Bank of New York on May 20th?"

"A. On account of which particular advance?

"Q. Your bill of particulars shows it was credited on account of the \$19,300 advance, dated November 12th, which in your bill of particulars is marked B?

"A. That is right.

"Q. Was there any conversation or letter between Cocco and yourselves directing you to credit that to account B and not any other account?

"A. No, we released collateral for that payment.

"Q. What collateral did you release?

"A. 640 cases of tall pink salmon, Diana Brand.

"Q. On the same date you got a check for \$1,700, which was deposited in the Chase National Bank, which you credited to account A. Did you release any collateral for that?

"A. Account A being what?

"Q. The first one \$16,000.

"A. I do not believe we did.

"Q. On May 11th, there were deposited by Cocco in the Chase National Bank to your account \$4,500. Did you release any collateral for that?

"A. We did.

"Q. What collateral did you release for that?

"A. 275 cases Del Monte bartlett pears, 250 cases Easter Extra Standard bartlett pears.

"Q. On May 4th you got \$8,000 from the Chase National bank. Did you release any collateral for that payment?

[fol. 462] "A. May I ask which account?

"Q. Yes, that is on account E, the \$36,000 transaction.

"A. We did.

"Q. What did you release there?

"A. 1,200 cases of choice evaporated apples."

5. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and exception of the plaintiff of alleged testimony of the plaintiff's witness, William P. Cosgrove, before the New York County Grand Jury (cross examination of plaintiff's witness, William P. Cosgrove), as follows:

"Q. Did you not tell the Grand Jury in that case that on or about November 12th and in the County of New York that A. J. Cocco obtained from your possession five certain promissory notes totaling \$16,000?

"Mr. Podell: I object to that as an apparent attempt to read from a copy of an indictment an implication that that was the testimony furnished by this witness. He is in no-wise responsible for the indictment.

"The Court: No, but he may ask him what he said.

"The Witness: I do not recall.

"Q. Did you state to the District Attorney in charge of the matter at that time that in the County of New York on or about November 12th, A. J. Coccaro had obtained from your possession five certain notes totaling \$16,000?

"Mr. Podell: I make the same objection as incompetent and irrelevant, and not a proper method of cross examination.

"The Court: Overruled.

[fol. 463] "Mr. Podell: Exception.

"A. I do not recall any reference to those five particular notes."

6. That the Trial Court erred in excluding certain evidence offered by the plaintiff, to wit, that certain differences between prices at which sales of the plaintiff's notes were credited to the plaintiff by S. B. Lewis & Co., and the actual selling prices of such notes were refunded to the plaintiff because the retention of such difference would be contrary to agreement and to law (redirect examination of plaintiff's witness, Edgar H. Cockrill), as follows:

"Q. As such broker, did you consider it was fair and reasonable or in accordance with the law that you should make any profit other than your commission?

"Mr. Frank: I object to that.

"The Court: Sustained.

"Mr. Podell: Exception.

"The Court: What he considers is not the point. He has testified to what he did.

"Mr. Podell: Your Honor has asked him for the operations of his mind.

"The Court: No, I have asked him only for the actual transactions. I have not asked a word about the operations of his mind. At least, I did not intend to."

7. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and exception of the plaintiff of an alleged oral conversation between William P. Cosgrove and John J. McAndrew which was merged in the written contract between the plaintiff and A. J. Coccaro & Company, Plaintiff's Exhibit 41-A-A, [fol. 464] also marked Defendants' Exhibit C (direct examination of defendants' witness, John J. McAndrew), as follows:

"Q. And was there a conversation then between Mr. Cosgrove and yourself?

"A. Yes.

"Q. What was that conversation?

"Mr. Podell: I object to the conversation on the ground that it is an attempt to vary or modify written instruments.

"The Court: He may answer.

"Mr. Podell: Exception. I object on the ground that it is an attempt to modify written instruments, and is incompetent, irrelevant and immaterial, and not within the issues, not within the pleadings, and not binding upon the plaintiff. Your Honor will allow me an exception?

"The Court: Yes.

"Q. Please speak up and answer the question.

"A. I asked Mr. Cosgrove if he would be interested in making a loan on some foodstuffs that we had in a warehouse. As near as I can recall the exact conversation at that time, he told me that, as a general rule, they liked to loan their money on raw materials, but we discussed the matter, and he said the probabilities were that he would make the loan, as it was more or less of a staple line.

"Q. A staple line?

"A. Yes, so then I asked him what would he charge me to make the loan. He told me that it would cost me, as near as I can remember—and I will be frank and tell you that I have looked over the books of A. J. Coccaro & Company [fol. 465] pany recently, and have had my memory refreshed—

"Mr. Podell (interposing): I move that that be stricken out.

"The Court: Yes.

"Mr. Frank: All right.

"Q. You saw the books in the office of the trustee?

"A. In the office of the receiver, Mr. Benjamin Lesser, 299 Broadway.

"Q. After you had stated to him that you wanted this loan, what did he say?

"A. He told me it would cost me one-quarter, one-half, and one per cent. I asked him did he mean a quarter of one per cent. per annum, or per month, so he told me per month, so I asked him why he did not tell me the exact figure. He said, 'Well, it is the method that we apply in our payments.' He said, 'We get one-quarter of one per cent. for our commission.' He said, 'We pay one-half or thereabouts, or whatever the money costs us,' and he said, 'The one per cent. you pay to A. U. Surprenant & Company.' I asked him why I should pay A. U. Surprenant & Company, and he told me that that was the only way he could do business with me, would be through A. U. Surprenant & Company. I then told him that my reason for telephoning to him and getting in touch with him was to avoid paying A. U. Surprenant & Company; that I knew that Coccaro in previous transactions made his loans through A. U. Surprenant & Company, and it was my duty, or rather my work at the time with Coccaro to try to obtain those loans as cheap as possible. Well, I said, 'All right, [fol. 466] because I have been instructed to get the money,' and we needed money.

"Mr. Podell: I move that that be stricken out.

"The Court: Yes, strike it out.

"Q. Won't you please tell us what you said to Mr. Cosgrove and what Cosgrove said to you?

"A. I had in mind—I had with me a list or memorandum of all of the merchandise I wanted to obtain a loan on, and I gave him that list.

"Q. When did you see Mr. Cosgrove again, after you gave him that list?

"A. As near as I can recall, he investigated——

"Q. (Interposing.) Never mind that. When did you see him again?

"A. I think it was the morning of the day that I went to Philadelphia.

"Q. What happened then?

"A. He was in the office and he had the documents that it was necessary for us to sign.

“Mr. Frank: Have you got those exhibits—exhibits as to the first loan of \$16,000?

“Q. I show you a printed form—I show you three papers dated November 6, 1919 (handing papers to witness). Just take a look at those papers. Were those papers—did you see those papers before?

“A. Have I seen those papers before?

“Q. Yes.

“A. I have seen similar papers. I don't know whether I have seen those exact papers, but according to the system employed and the dates on here, those are supposed to be the papers that—

“Q. (Interposing.) At any rate, did Mr. Cosgrove on the second occasion you saw him, produce any printed papers? [fol. 467] “A. He had this form with him, and I know there were two or three signatures required.

“Q. And were they signed in your presence by A. J. Coccaro & Company?

“Mr. Podell: I object unless the papers are identified.

“Mr. Frank: We are referring to papers which are in evidence, but not marked separately. They have been offered in evidence, but I would like to have that identified now particularly as to the so-called pledged contract, dated November 8, 1919.

“(Paper marked Defendants' Exhibit C.)

“Mr. Frank: And the paper dated November 6 bearing, as the first printed words on it, 'Philadelphia Warehouse Company,' signed A. J. Coccaro.

“(Paper marked Defendants' Exhibit D.)

“Q. When he produced those printed papers at that time, at the time of the second conversation, did Mr. Coccaro sign them?

“A. I gave them to Mr. Coccaro and he signed them.

“Q. Was anything said at that time?

“A. Yes, we were anxious—

“Mr. Podell (interposing): The same objection.

“The Court: Same ruling.

“Mr. Podell: Exception.

"Q. Go head.

"A. I can answer?

"Q. Yes.

"A. We were—we discussed the matter of obtaining the money immediately, and as near as I can recall, Mr. Cosgrove called up the office of the Philadelphia Warehouse [fol. 468] Company, and told them to obtain a check, that Mr. McAndrew, from the firm of A. J. Coccaro & Company, would be over after one o'clock and obtain it. As near as I can remember, I think I got an eleven o'clock train, for I knew that when I got there——

"Q. (Interposing.) Was there anything said at that time or immediately prior to that time that those papers were signed, about the signature or about the contents?

"A. I looked over the papers.

"Q. Tell us what you said, as nearly as you can remember the words.

"A. As near as I can remember it, I asked Mr. Cosgrove what was the idea of all those papers, and he told me that this was a form that was given to them by their attorneys, and the reason for doing it was to comply with the law."

8. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and exception of the plaintiff of transactions between A. J. Coccaro & Company and A. U. Surprenant & Company (Direct examination of Defendants' witness John J. McAndrew), as follows:

"Q. There was a telephone call?

"A. Yes.

"Q. And after you had it, did you go anywhere?

"A. Mr. Surprenant, that was the man——

"Q. (Interposing.) What did you do when you went there?

"Mr. Podell (interposing): I object.

"The Court: He may ask him what he did.
[fol. 469] "Mr. Podell: Exception.

"The Witness: Mr. Surprenant——

"Q. You are not allowed to tell us what he said to you, but just tell us what you did?

"A. I obtained a check for \$720, and I took the check over to the office of A. U. Surprenant——

"Q. (Interposing.) Whose check was that?

"A. It was a check of A. J. Coccaro & Company. I cannot—

"Mr. Podell (interposing): I move to strike that out as certainly not binding upon us. We don't know anything about these transactions that Coccaro had, and in what way is this binding?

"The Court: It may stand until I see what connection there is, if any.

"Mr. Podell: Exception.

"Q. What did you do with the check?

"A. I went over and got the check—

"Q. (Interposing.) What did you do with it?

"A. I took either the check or cash over to the office of A. U. Surprenant & Company."

9. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and exception of the plaintiff of transactions between A. J. Coccaro & Company and A. U. Surprenant & Company (Direct examination of defendants' witness John J. McAndrew), as follows:

"Q. Did you ever bring any other checks over to Mr. Surprenant?

"A. Yes, I brought numerous checks over—

[fol. 470] "Mr. Podell (interposing): I move that that be stricken out.

"The Court: Overruled.

"Mr. Podell: Exception.

"Q. Are you able, without reference to these books, to give us the date and amount of any other payment which you made to Mr. Surprenant with reference to any of these loans?

"A. I would have to look at the book.

"Q. Will you look at this book and see if it refreshes your recollection in any way as to any other check that you ever brought to Surprenant's office (handing book to witness)? You say it was on January 16. What did you do on January 16?

"A. I made this payment on a \$5,700 loan.

"Q. What was the amount, if any, that you brought to Surprenant's office?

"A. \$114 on a \$5,700 loan.

"Q. Do you recall, or does the entry refresh your recollection in any way, as to whether the amount of \$114 was in cash or by check?

"A. No, it does not.

"Q. That day——

"A. (Interposing.) I don't even—I can't testify correctly whether that was an individual check, or whether that check was included in another check. We were paying him other commissions on other transactions.

"Q. I see; and on what date was it, if you can tell by reference to the bill of particulars, that the Coccoaro Company received or made the arrangement for the \$5,700 transaction?

"A. On January 5.

"Q. And was anything said at all to you by Mr. Surprenant or Mr. Cosgrove when you came in with that check?

"A. On this particular transaction, as well as my memory can serve me, I don't recall seeing Mr. Cosgrove in the office of A. U. Surprenant when I brought over that payment.

10. That the Trial Court erred in admitting certain evidence on behalf of the defendants over the objection and exception of the plaintiff of an oral conversation between William P. Cosgrove and John J. McAndrew which was merged in the written contract between the plaintiff and A. J. Coccoaro & Company, Plaintiff's Exhibit 41-A-A, also marked Defendants' Exhibit C (direct examination of defendants' witness John J. McAndrew), as follows:

"Q. Are you able, without refreshing your recollection, to recall the times when you brought any other checks to Surprenant, or whether they had any reference to any of these other transactions?

"A. I can recall that our instructions were that we had to make——

"Mr. Podell (interposing): I move that that be stricken out.

"The Court: Yes.

"Q. From whom did you get these instructions?

"A. From whom did I get these instructions?

“Q. Yes.

“A. From the arrangements that I made with Mr. Cosgrove at the inception of the transaction——

“Mr. Podell (interposing): I move that that be stricken out as a conclusion.

“The Court: Just read that.
[fol. 472] “(Answer read.)

“The Court: It may stand.

“Mr. Podell: Exception.

“Q. What had Mr. Cosgrove told you at the inception of the transactions?

“Mr. Podell: I object to that as conversation that has already been gone over, and is in the record, and it has been answered.

“The Court: If there is anything in addition to what you have already stated, you may testify to it. Otherwise, I think it has been gone over.

“Mr. Podell: Exception.

“The Witness: Mr. Cosgrove had me to distinctly understand that I would have to pay a one per cent commission per month to Surprenant, and that would have to be paid before we would receive our check from that concern.”

11. That the Trial Court erred in excluding certain evidence offered by the plaintiff, to wit, who were the directors of the plaintiff at the time of the trial (redirect examination of plaintiff's witness William P. Cosgrove) by ruling as follows:

“Q. Now, Mr. Cosgrove, will you please tell us who are the members of your Board of Directors of the Philadelphia Warehouse Company?

“A. Well, there is——

“Mr. Frank (interposing): I object to that as entirely incompetent, irrelevant and immaterial.

“Mr. Podell: I think we are entitled to show who the people are that are conducting this business, your Honor.

“Mr. Frank: I object to it.
[fol. 473] “Mr. Podell: The plaintiff is a corporation, and the character of its business is very seriously impeached, and I think it is at least my duty to let the jury know the type of men who are running its business.

"Mr. Frank: I object; we are not impeaching them at all. I object to the form of the question.

"The Court: Objection sustained.

"Mr. Podell: I except."

12. That the Trial Court erred in denying the plaintiff's motion to strike out the first defense set forth in the defendant's amended answer and the plaintiff's motion for the direction of a verdict in favor of the plaintiff for the full amount sued for by ruling as follows:

"Mr. Podell: I likewise move to strike out the first defense, on the ground that there has been no evidence of usury established as a matter of law.

"The Court: Overruled.

* * * * *

"The Court: The loan was necessarily made in New York, because the loan was not complete, as a loan, until the money came to New York. The whole inception of the transaction was in New York; the completion of the loan, if the jury find it to be a loan, was in New York and, therefore, the law which will control as to the effect of usury, if it was usury, will be the law of New York.

* * * * *

"The Court: There is sufficient to raise an issue of fact, and it is for the jury to determine. The only question [fol. 474] as to which I was at all doubtful was as to whether the law of New York or the law of Pennsylvania controls. I believe that this decision cited to me in the Appellate Division determined the law of New York. I personally believe that the decision is sound; at least, that was my view before the decision was out, that the mere fact that the note was payable in Philadelphia, was immaterial, or that the money was paid in Philadelphia, assuming it to be a loan.

"Mr. Podell: You mean the ultimate repayment is immaterial?

"The Court: It is not controlling it is not decisive. I will let the jury determine it.

"Mr. Podell: May I ask your Honor, for fear the jury may have misunderstood or misconstrued some of our dis-

cussion, that you expressly instruct them that this discussion has been about a point of law, and has nothing to do with the testimony?

"The Court: I will state that fully when I come to charge.

"Mr. Podell: Your Honor allows me an exception?

"The Court: Yes.

"Mr. Podell: And you will permit me to note on the record my motion for the direction of a verdict?

"The Court: Yes.

"Mr. Podell: And I except as to the main point, on the ground that there has been no defense of any kind established."

13. That the Trial Court erred in charging the jury that [fol. 475] the law of the State of New York applied to the contract herein sued upon and that if the jury found the said contract to be usurious the jury must bring in a verdict for the defendants by charging as follows:

"Because whether you like it or not, whether I like it or not, whether I think it is just, or whether you think it is just or wise, the law of the State of New York—and I have heretofore said in this case that if this is a usurious transaction, the law of the State of New York must govern—the law of the State of New York says, subject to certain exceptions, that have no place in this case, if a loan is made at a usurious rate of interest, above six per cent, the lender cannot recover a penny. Now, that may strike you, as merchants, as very, very hard. It is not the law in a good many States, but that is the law of New York; that is the law which you have sworn to apply in this case, if, under the facts, it becomes applicable. There would not be any difference in that respect whether this were a fight between Coccoaro and the plaintiff, or a fight between Seeman Brothers and the plaintiff. Seeman Brothers, despite their complete innocence, despite the fact that if they lose they are victimized, and have recourse only against a bankrupt scoundrel for that victimization, they stand in no better position than he stands, or would stand, if he were before you, if he had gotten hold of these goods, and if the plaintiff were trying to get them back from him. The plaintiff, however, would no more be entitled to get them back from [fol. 476] Coccoaro, than it would be entitled to get them

back from Seeman Brothers, if the transaction under which the plaintiff got its rights was a usurious one."

* * * * *

"Now, as I say, you are to determine whether the surface transaction was the real transaction, or whether the real transaction was a loan from the Philadelphia Warehouse Company to Coccaro, and usurious as a loan, under the law. I should add this: if you find that there was usury—that is, that it was a loan permeated with usury, then your verdict is for the defendant."

* * * * *

"Mr. Podell: Your Honor, I have no requests except if your Honor will permit me to note my exceptions to your Honor's statement to the jury that the law of New York applies, just so that my record will be consistent."

14. That the Trial Court erred in denying the plaintiff's motion to set aside the verdict herein and for a new trial by ruling as follows:

"The Court: Gentlemen of the Jury, listen to your verdict. You find a verdict for the defendant, and so say you and so say you all.

"Mr. Podell: Now, if your Honor please, I move to set the verdict aside on all the usual grounds specified, whatever they may be—I forget what they are at the moment—and on the ground it is against the weight of evidence and against the law.

"The Court: Overruled.

"Mr. Podell: Now, if I may, your Honor, before your Honor finally rules—I do not want you to disturb the findings on the facts, if there are any facts, but I would like to have an opportunity, in view of the fact that the case involves, as I think has been stated, rather questions of law—we would like to have an opportunity to brief them and submit them to your Honor for your consideration.

"The Court: I think the jury had the right to consider the direct loan by the Philadelphia Warehouse Company to Coccaro—had a right to consider that they were loaning a net amount less the discount and were getting from him that discount rate plus three per cent, and, in that case, the Philadelphia Warehouse Company had no obligation whatsoever to turn over the funds that it received or did not

turn over the funds that it received for the notes, but could have used them for any purpose it pleased, and therefore could be deemed to have made a perfect direct loan to Coccaro, whose loan became effective when Coccaro received the money in New York; and the only question then that might involve further law would be the fact whether Coccaro considered this loan was to be repaid in Philadelphia. But, in my judgment, the mere fact that it was to be repaid in Philadelphia, under the cases that have been cited and read, would not be sufficient in the State of New York to make the Pennsylvania law on the subject invalid.

"Now, that is the only question as to which I had some doubt. If you want to brief that one question, very well.

[fol. 478] Mr. Podell: That is all I had in mind, I do not think that case is conclusive. I think, your Honor, we can satisfy you—I will want to look it up further before I make it finally—that the rule is different in the Federal Courts and has been interpreted differently and that the place of performance is the determining factor under the federal decisions. I confess I have not had an opportunity to look into it.

"The Court: All right then, I will give you that opportunity.

"Mr. Frank: And may I have a copy of it?

"The Court: Yes.

"Mr. Podell: And your Honor will allow me an exception to your ruling?

"The Court: Yes, I will reserve decision, then, instead of overruling the motion."

15. That the Trial Court erred in entering an order herein denying the plaintiff's motion to set aside the verdict herein and for a new trial.

16. That the Trial Court erred in denying the plaintiff's motion to set aside the verdict herein for a new trial upon the exceptions taken by the plaintiff upon the trial.

17. That the trial Court erred in denying the plaintiff's motion to set aside the verdict herein and for a new trial because the verdict is contrary to the evidence.

18. That the Trial Court erred in denying the plaintiff's motion to set aside the verdict herein and for a new trial because the verdict is contrary to the law.

[fol. 479] 19. That the Trial Court erred in entering judgment herein dismissing the complaint herein with costs to the defendants.

Wherefore, the plaintiff in error prays that the judgment of said Trial Court be reversed and a new trial granted or judgment directed for the plaintiff in error for the full amount demanded in the complaint herein.

Leventritt, Riegelman, Carns & Goetz, Attorneys for Plaintiff.

Office & P. O. Address #128 Broadway, Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States, for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which is in the District Court, before you, or some of you, between Philadelphia Warehouse Co., plaintiff-in-error, and Joseph Seeman, Sigel W. Seeman, Sylvan L. Stix, Carl Seeman and Frederick R. Seeman, copartners doing business under the firm name and style of Seeman Brothers, defendants-in-error, a manifest error hath happened, to the great damage of the said Philadelphia Warehouse Co., plaintiff-in-error, as is said and appears by its complaint, [fol. 480] we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 21st day

of July, 1924, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 21st day of June, in the year of our Lord One thousand nine hundred and twenty-four, and of the Independence of the United States the One Hundred and Forty-eighth.

Alex Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit. (Seal.)

The foregoing writ is hereby allowed.

Jno. C. Knox, U. S. District Judge.

[fol. 481] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD

We hereby stipulate that the Clerk of this Court shall certify as the record on appeal herein copies of the following and no others, to wit:

Statement, citation, summons, complaint, amended answer, plaintiff's bill of particulars (exhibits attached thereto which are copies of documents offered in evidence at the trial need not be printed but reference to such documents offered in evidence shall be sufficient), sealed verdict, clerk's minutes, order denying motion for new trial, judgment, bill of exceptions, affidavit of no opinion, order allowing writ of error and consent, petition for writ of error, assignment of errors, writ of error, this stipulation, stipulation as to record, and certificate of clerk to record.

Dated New York, Sept. 25, 1924.

Leventritt, Riegelman, Carns & Goetz, Attorneys for Plaintiff. Cohen, Cole & Weiss, Attorneys for Defendants.

[fol. 482] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated New York, Sept. 25, 1924.

Leventritt, Riegelman, Carns & Goetz, Attorneys for
Plaintiff in Error. Cohen, Cole & Weiss, Attor-
neys for Defendants in Error.

[fol. 483] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of July in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk.

[fol. 484] IN UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

PHILADELPHIA WAREHOUSE Co., Plaintiff-in-Error,
against

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX, CARL
Seeman, and Frederick R. Seeman, Copartners, Doing
Business under the Firm Name and Style of Seeman
Brothers, Defendants-in-Error

Writ of error to the District Court for the Southern Dis-
trict of New York. Suit by Philadelphia Warehouse Com-
pany, plaintiff, against Joseph Seeman, et al., defendants,
for conversion of pledged merchandise. Judgment for
defendants; plaintiff appeals. Reversed.

David Leventritt, Esq., Charles A. Riegelman, Esq., Nor-
man S. Goetz, Esq., Counsel for Plaintiff-in-Error.

Samuel F. Frank, Esq., Harry J. Leffert, Esq., Arthur
W. Weil, Esq., Counsel for Defendants-in-Error.

OPINION

MANTON, Circuit Judge:

The plaintiff-in-error is a Pennsylvania corporation do-
ing a warehouse business in that state, and the defendants-
[fol. 485] in-error are co-partners engaged in the wholesale
grocery business in New York State. The action is brought
to recover Eight thousand dollars for the conversion of
cases of salmon, title to which was in the plaintiff-in-error
under a negotiable railroad bill of lading endorsed to it
by the pledgor, Coccoaro & Company, a partnership, in New
York City, on November 18, 1919. They were pledged as
security for an advance of credit in the sum of Five thou-
sand nine hundred dollars to be made by the plaintiff-in-
error under the terms of a pledge agreement to be held as
security also for other advances of credit prior and sub-
sequent. The answer, which was sustained by the jury's
verdict below, was that the loan to A. J. Coccoaro & Com-
pany was usurious and that the defendants-in-error pur-
chased the salmon in good faith and for a valuable con-

sideration. A. J. Coccaro & Company became bankrupts. A note for Five thousand nine hundred dollars dated November 18, 1919, payable January 20, 1920, was issued and delivered to the plaintiff-in-error. This note was sold in Philadelphia, Pa. by a firm of note brokers on November 19, 1920, under a written order from A. J. Coccaro & Company. The net proceeds of this sale—\$5,834.20—represented by a cashier's check to the order of the plaintiff-in-error, was received by it from the note brokers and thereafter endorsed and delivered by it to the order of the First National Bank of Philadelphia. This bank at once remitted to A. J. Coccaro & Company in New York City, at their request, by a transfer of such funds to the Irving [fol. 486] National Bank. The business of the plaintiff-in-error for fully half a century, had been to loan its credit by delivering its promissory note to a merchant who pledged with it merchandise to insure payment of the merchant's note at maturity. The pledgor received a note which could readily be turned into cash by its sale through note brokers through various banks throughout the country. Thus in this way, the plaintiff-in-error advanced its credit upon merchandise deposited with it as collateral to an agreed percentage of the market value of such merchandise. This was determined by the plaintiff-in-error's inspection and appraisal. The charge for issuing its promissory note against the pledge of the merchandise in a public warehouse was three per cent per annum upon the face amount of its notes so issued. Beyond this charge, no other remuneration or commission was directly payable to it, but the pledgor or borrower would pay a commission to a note broker in consideration for the sale by him as the agent of the borrower. Its practice was to deliver to the borrower the identical check received from the broker. It was the policy to sell through brokers because this was a business in itself and is now a recognized method of disposing of commercial paper throughout the country. This method of doing business typified the transaction involved in this litigation. The document used was a printed pledge agreement which read in part as follows:

“Having deposited with, and confided to the management, [fol. 487] custody and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that Company having advanced

its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Five thousand nine hundred Dollars dated November 18, 1919, payable January 20, 1920, receiving Thirty and 48/100 Dollars as commission for its responsibility and services, as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or before the maturity of its said promissory note, Five thousand nine hundred Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody and charge.

3. The property pledged hereunder, together with any heretofore or hereafter pledged by the undersigned to the said Company to secure this or any other liability, general or special, shall constitute a general continuing collateral security for all obligations or liabilities of the undersigned to the said Company now existing or hereafter created, [fol. 488] contingent, absolute, liquidated, or unliquidated, and the said Company's right, title, and interest therein shall be prior to all liens or claims thereon, or on the proceeds thereof. And if any property be consigned or delivered to the said Company by the undersigned, either in substitution for property withdrawn or as additional security, such substituted or added collateral shall be subject to all the terms and conditions of this contract, including the maintenance of whatever margin may be stipulated for in case of such property."

The notes were delivered as above indicated and the money paid. When the salmon was pledged under this agreement at the request of A. J. Coccaro & Company, the plaintiff-in-error instructed the Yorke Warehouse & Storage Company, Inc., of New York City, to secure the cases of salmon from the railroad and store the same in one of its warehouses for the security of the plaintiff-in-error. Thereafter, the plaintiff-in-error received from the warehouse, a non-negotiable warehouse receipt for the salmon, and between February 25th and March 26th, 1920, the defendants-in-error and their assignors removed the cases of salmon

from the warehouse under an order issued by Coccaro on February 8th, 1920. This appropriation was made possible through the fact, which was unknown to the plaintiff-in-error, that the Yorke Warehouse was owned by Coccaro through stock ownership, and that its employees would do their bidding pursuant to instructions. Coccaro asked for [fol. 489] extensions of time to pay the note of Five thousand nine hundred dollars, and this was granted. The procedure each time followed its regular method of business dealing which is referred to above.

The bankruptcy of A. J. Coccaro & Company occurred prior to the last advance. The firm was indebted for its advances of money loaned and these credits form the basis of this suit. The defense of usury is based upon the claim that this was not a loan of credit but a mere sham and a device for which the forms used by the plaintiff-in-error were mere cover and that in fact, the actual agreement between the plaintiff-in-error and Coccaro was for loaning them moneys from time to time upon merchandise in warehouses as security and that Coccaro did pay one-half per cent per month, which was the market rate for money; one-fourth per cent per month to the plaintiff-in-error for making up its three per cent, and one-sixteenth per cent per month to the note brokers, all of which amounted to more than six per cent, the legal rate of interest chargeable in New York. The claim is that the contract is governed by the laws of New York and is usurious. The court submitted the question of usurious charge to the jury and it found for the defendants-in-error.

The plaintiff-in-error's contracts and method of transacting its business, had met with the approval of the highest court in Pennsylvania. (*Righter & Sowgill v. Philadelphia Warehouse Co.*, 99 Penn. St. 289). The courts have long recognized the difference between a lending or sale of credit [fol. 490] and the lending of money, and have repeatedly held that for a lending or sale of credit any price demanded may be paid by the borrower without subjecting the contract to the taint of usury. (*Ryttenburg v. Schefer*, 131 Fed. 313; *Title Guarantee & Surety Co. v. Klein*, 178 Fed. 689; *Meeker v. Fiero*, 145 N. Y. 165). On order to taint a loan with usury a corrupt purpose or intent on the part of the person who takes the security to secure an illegal rate of interest for the money or forbearance of money must

exist as a fact or in law. There must be a lender and a borrower and it must appear that the real purpose of the negotiations and transaction was, on the one side, to loan money at usurious interest reserved in some form by the contract, and on the other side, to borrow upon the usurious terms dictated by the lender. (*Orvis v. Curtiss*, 157 N. Y. 657.) Any person is at liberty to sell his credit at whatever price he can get for it, precisely as he is at liberty to sell any other commodity which he may have. If the transaction is in good faith and not a mere cloak or device for covering a usurious contract, a greater discount may be charged than the prescribed rate of interest without contravening the usury laws. And where usury is interposed as a defense, it must be proved by the party asserting it.

In the plaintiff-in-error's case in Pennsylvania, where the court there had occasion to consider the claim of usurious transactions, it said:

"If the testimony tended to prove that the transaction [fol. 491] between the parties was merely a cloak for usury, and not a bona fide contract for the storage and sale of goods, to secure the loan in question, it must be conceded the jury should have been permitted to consider and pass upon the question of fact presented by the plaintiff's first and second points (the first point being the one quoted above) but we fail to discover, in the provisions of the contract itself, or in the facts and circumstances connected therewith, from its inception to its completion, anything from which the jury would have been justified in finding that it was, in substance and effect, a loan of money at an usurious rate of interest."

The discount of three per cent. was agreed by the parties to be for the loan of the plaintiff-in-error's credit when it issued and delivered the note which was subsequently sold by Coccoaro's agent. The sum paid the note broker was a necessary deduction to affect the sale of the note. The three per cent per annum paid to the plaintiff-in-error upon the face of the note was to cover its services for advancing their credit; that is, issuing the note and for such other services in connection with the security as might be necessary. Six per cent. was a lawful rate of interest. The compensation paid to the plaintiff-in-error was a return for the issuance of its note, for its obligation to pay and the

chances of reimbursement from the borrower. We see nothing in the evidence which raised an issue of fact that [fol. 492] the transaction was otherwise than as claimed by the plaintiff-in-error. There was nothing to the contrary to submit to the jury, and in the absence of evidence that the document did not disclose the true transaction, it became the duty of the court below to interpret the documents and to decide what the transaction was, and in this instance, we think to hold that it was not usurious. This question was presented upon a motion for a direction of a verdict which was denied and to which exception was taken. Below there was a failure to distinguish between a loan of money and a loan of credit.

There is another difficulty in sustaining the judgment below. The theory upon which the case was submitted to the jury was that the transaction was a loan made in New York because the loan was not complete as a loan until the money contracted for reached New York. It was pointed out that the whole inception of the transaction was in New York, as was also the completion of the loan, and it was held that the laws of New York governed. This transaction took place in November, 1919, and extensions were given in January and March, 1920. The first transaction between the plaintiff-in-error and Coccoaro took place in January, 1918, when another note broker introduced Coccoaro to the secretary of the plaintiff-in-error. This interview resulted in the first transaction between the plaintiff-in-error and Coccoaro. However, the documents were dated in Philadelphia and the note was issued there. It was also paid for there. [fol. 493] There is no evidence showing or tending to show that anything but the plaintiff-in-error's customary business methods were followed. The payments to redeem the pledged articles were required to be paid plaintiff-in-error in Philadelphia; the note brokerage firm carried on its business in Philadelphia, and the check representing its proceeds was dated in Philadelphia and forwarded by the plaintiff-in-error to its bank in Philadelphia. Thus it appears that the entire transaction took place in Philadelphia and within the State of Pennsylvania with the exception of the signing of the pledge agreement and the delivery of the instruction to have the note sold and the eventual receiving of the money by the Irving National Bank in New

York City. These parts of the transaction were for Coccoaro's convenience. The loan did not have its inception in New York nor was it completed in New York. The transaction was carried out in Philadelphia. The renewals of this extension of credit were in each instance upon written application of Coccoaro sent to Philadelphia. The pledge agreement was drawn and dated in Philadelphia; the contract was a unilateral one and did not become binding in its terms until the plaintiff-in-error issued its note and that act was done in Philadelphia. Thus the obligations of the contract and its fulfillment are to be determined by the laws of the State of Pennsylvania. The test of the place of a contract is where the last act was done by either of the parties which was essential to a meeting of the minds. Until this act is done, there is no contract and upon its being [fol. 494] done, at a given place, the contract becomes existant and becomes existant at the place where the act was done. (Clark vs. Belt, 223 Fed. 573; 2 Wharton on Conflict of Laws, 3d Ed. Sec. 422 [a]). In Tilden vs. Blair (21 Wall. 241), a draft was accepted in New York, sent to Illinois to be negotiated and it was held that the contract was an Illinois contract.

The proceeds of the notes were delivered to Coccoaro's representative, the note broker in Philadelphia, and in some of the six transactions, were mailed from Philadelphia to their office in New York or telegraphed to their bank in New York from Philadelphia. Delivery of the money in Philadelphia to the personal representative, the note broker, completed the loan in Pennsylvania, as did also delivery of it to the bank for transmission to New York. When the plaintiff-in-error put the money in the bank in Philadelphia, it was then telegraphed to New York, and plaintiff-in-error lost control of it to Coccoaro's representative in Philadelphia, namely, the note broker. A well recognized rule of law provides that the law of the place of performance controls as the *lex loci*. Where the contract was made and whether the contract was made and whether the pledge agreement constituted the contract of the parties, becomes quite immaterial because under the agreement, performance of the contract, that is, the repayment by Coccoaro, was to be in Pennsylvania and the laws of that state applied. (Central Bank of Washington v.

[fol. 495] *Hume*, 128 U. S. 195; *Coughlan v. So. Carolina R. S. Co.*, 132 U. S. 101; *N. E. Oil Corp. v. Island Oil Marketing Corp.*, 288 Fed. 967; *Brower v. Life Ins. Co. of Va.*, 86 Fed. 748; *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491). The Pennsylvania Statute (Public Laws 622, of May 28, 1858) does not make it unlawful for a debtor to pay to a creditor or a creditor to receive more than six per cent interest. (*Montague v. McDowell*, 99 Pa. 265; *Strayton v. Riddle*, 114 Pa. 464.) That statute merely gives the borrower the right where the interest is in excess of six per cent, to deduct the excess upon paying the principal debt or, if it has been paid, to recover such excess if the action was begun within six months from the time of the payment. The only defense urged below is that of usury. We hold that this transaction was not usurious and judgment should have been directed for the plaintiff-in-error.

Judgment reversed.

[fol. 496] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed May 18, 1925

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District [fol. 497] Court be and it hereby is reversed with costs. Further ordered that execution be issued for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H. M. T. M.

[File endorsement omitted.]

[fol. 498] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 497 inclusive, con-

tain a true and complete transcript of the record and proceedings had in said Court, in the case of [Title omitted] as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 13th day of August in the year of our Lord One Thousand Nine Hundred and twenty-five and of the Independence of the said United States the One Hundred and fiftieth.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals.)

[fol. 499] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8558)

No. 6 198

FILED

AUG 15 1925

WM. R. STANSBURY

IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX,
CARL SEEMAN and FREDERICK SEEMAN, copartners,
doing business under the firm name and style of
Seeman Brothers,

Petitioners,

—against—

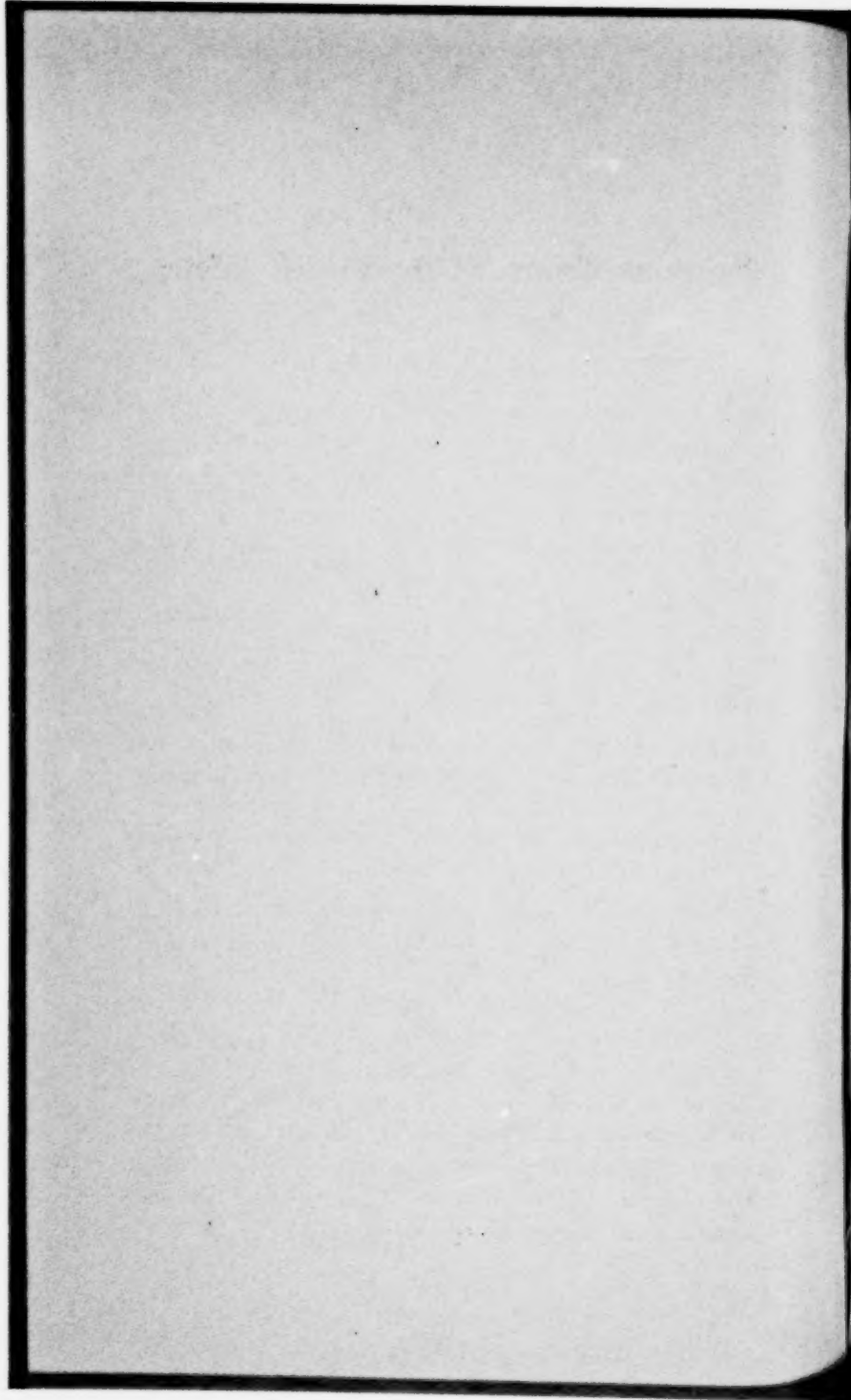
PHILADELPHIA WAREHOUSE Co.,

Respondent.

**Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit.**

COHEN, COLE & WEISS,
Attorneys for Petitioners,
No. 61 Broadway,
New York City.

SAMUEL F. FRANK,
Of Counsel.



IN THE
Supreme Court of the United States,

OCTOBER TERM—1925.

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX,
CARL SEEMAN and FREDERICK SEEMAN, copartners,
doing business under the firm name and style of
Seeman Brothers,

Petitioners,

—against—

PHILADELPHIA WAREHOUSE CO.,

Respondent.

**Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit.**

*To the Honorable, the Chief Justice and Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioners, Joseph Seeman, Sigel W. Seeman,
Sylvan L. Stix, Carl Seeman and Frederick Seeman, re-
spectfully represent as follows:

1. That on April 12, 1921, the respondent com-
menced an action against your petitioners at Common
Law, in the United States District Court for the South-
ern District of New York, for the recovery of damages
alleged to have been caused by conversion of certain
canned salmon in the sum of Eight thousand (\$8,000)
Dollars, with interest and costs.

Your petitioners answered that respondent's alleged title to the salmon was based upon an alleged pledge as security for a usurious loan to one Coccaro, which loan was void under the laws of the State of New York, where it occurred; and that said statute provided that such a transaction was entirely void and unenforceable.

2. Said action was duly tried before Hon. Julian Mack, Circuit Judge, and a jury, for six days, and, during the trial evidence as to the real nature of the transaction was heard at length. On November 14th, 1923, the jury rendered a verdict in favor of the defendants, your petitioners, upon which a verdict was entered and on December 28th, 1923 a motion to set aside the verdict and for a new trial was denied by Judge Mack.

3. Respondent sued out a Writ of Error to the United States Circuit Court of Appeals for the Second Circuit, which on May 11th, 1925, filed an opinion directing that the verdict of the jury, the judgment entered thereon, and the order denying the motion for a new trial, be reversed—concluding in the following language:

"The only defense urged below is that of usury. We hold that the transaction was not usurious and judgment should have been entered for the plaintiff in error.

Judgment reversed."

4. Respondent taxed costs amounting to \$761.70 and an order directing the issuance of mandate accordingly was entered on May 18th, 1925.

5. Your petitioners further represent that no appeal lies as of right by writ of error, petition for review or

otherwise, from said order of the Circuit Court of Appeals, and the said order was, therefore, final against your petitioners.

6. Your petitioners believe that the said opinion and order of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Acts of Congress in such cases made and provided.

7. Your petitioners further represent that, not only is the amount directly involved in this action considerable, but a number of other actions are now pending involving claims arising from said Coccoaro bankruptcy in which the essential issue is that of usury passed upon in the present case; and that such other actions await the determination of the present case, which was considered in the nature of a test case on the questions herein involved. Such actions, so far as your petitioners are informed, are as follows:

IN THE UNITED STATES COURT—SOUTHERN DISTRICT
NEW YORK.

*Philadelphia Warehouse Company v. Henry
Christie for \$10,000;*

*Philadelphia Warehouse Company v. Habicht
Braun & Co. for \$5,000;*

*Philadelphia Warehouse Company v. W. A.
Camp & Co. for \$8,500.*

IN THE NEW YORK SUPREME COURT—NEW YORK COUNTY.

Royal Bank of Canada v. Hills Brothers Co.
\$7,965.50;
Philadelphia Warehouse Co. v. Francis H.
Leggett for \$2,500.

IN THE CITY COURT OF THE CITY OF NEW YORK.

Philadelphia Warehouse Co. v. Elwood J.
Dixon for \$1,750.

8. That the public interest will be promoted by a prompt settlement in this court of the questions involved, and trials and appeals of the various actions referred to will be thereby avoided.

9. Your petitioners further show that the Circuit Court of Appeals, reversing the verdict of the jury, and the order of Judge Mack, held as a matter of fact that the transaction involved was not a usurious one; that its ruling as to interpretation of the usury statutes of the State of New York, is in direct conflict with the interpretation placed thereon by the Appellate Division of the Supreme Court of the State of New York, in the case of *Hoolcy v. Talcott*, 129 Appellate Division 233, which was cited in petitioners' brief and relied upon by petitioners at the trial, but which is in no way referred to in the opinion of said Circuit Court of Appeals. The said opinion, moreover, your petitioners submit, is in violation of Section 1011 of the Federal Judicial Code, in that in effect it reverses the findings of a jury as sustained by the trial Court upon a question of fact, although said opinion purports to hold that there was no evidence justifying the jury's verdict.

10. In order to point out the nature of the issue and facts involved in the case, the same may be briefly summarized as follows:

Your petitioners, merchants in business for over thirty-five years, purchased certain canned salmon concededly in good faith (fol. 706), in the open market in New York City from one Coccoaro. More than a year later, respondent commenced this suit against petitioners, claiming that these goods had been pledged with it by Coccoaro for a "loan of credit"; that Coccoaro had improperly withdrawn the goods from the warehouse, and that petitioners' purchase thereof (though in good faith and for value) thus constituted a conversion.

Upon the trial it appeared that respondent had a standing advertisement in the New York Journal of Commerce in the following form:

TIME LOANS ON MDSE.

in any responsible warehouse
at $\frac{1}{4}\%$ per month over lowest rate
for best commercial paper

No rehypothecation of notes or mdse.

No deposit balance to be maintained.

Interest allowed on prepayments for
releases of mdse.

Philadelphia Warehouse Company

3rd & Chestnut Sts., Phila.

Capital \$1,000,000 Surplus \$1,000,000

Established 1873.

The opinion of the Circuit Court begins by describing respondent as a Pennsylvania corporation "doing a warehouse business," though the record clearly discloses that it never owned or operated *any* warehouse *anywhere*

(fols. 424-425); but that its business was really making such "time loans on mdse." This opening misconception of the Circuit Court of Appeals is followed by its erroneous conclusion that respondent has discovered an unbeatable plan for evading the usury statute by the ingenious use of printed forms calling what it described in its advertisement as "*Time Loans on Mdse.*" loans of its credit.

The evidence disclosed that respondent's secretary, Cosgrove, came to New York and in New York made arrangements, as the result of which Coccaro got the money against a so-called pledge of his canned goods then in warehouse. The testimony of respondent's secretary on the point is as follows:

"Q. So then I am correct in stating that each one of those transactions that are stated in this Bill of Particulars of yours *you came to New York City and made the arrangements with Coccaro, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods then the deal was closed so far as the arrangement between you and Coccaro was concerned?* A. So far as the agreement to do what we undertook to do was concerned."

Respondent's called as a witness one McAndrew, an employee of Coccaro, who testified: that he negotiated with Cosgrove as follows (fol. 726):

"A. I asked Mr. Cosgrove if he would be interested in making a loan on some foodstuffs that we had in a warehouse. As near as I can recall the exact conversation at that time, he told

me that, as a general rule, they liked to loan their money on raw materials, but we discussed the matter, and he said the probabilities were that he would make the loan as it was more or less of a staple line."

Folio 728:

"A. He told me that it would cost me one-quarter, one-half, and one per cent. I asked him did he mean a quarter of one per cent. per annum, or per month, so he told me per month, so I asked him why he did not tell me the exact figure. He said, 'Well, it is the method that we apply in our payments.' He said, 'We get one-quarter of one per cent. for our commissions.' He said, 'We pay one-half or thereabouts, or whatever the money costs us,' and he said, 'The one per cent. you pay to A. U. Surprenant & Company.' I asked him why I should pay A. U. Surprenant & Company, and he told me that was the only way he could do business with me, would be through A. U. Surprenant & Company. I then told him that my reason for telephoning to him and getting in touch with him was to avoid paying A. U. Surprenant & Company; that I knew that Coccoaro in previous transactions made his loans through A. U. Surprenant & Company, and it was my duty, or rather my work at the time with Coccoaro to try to obtain these loans as cheap as possible. Well I said, 'All right, because I have been instructed to get the money.'"

Folio 733:

"Q. At any rate, did Mr. Cosgrove on the second occasion you saw him, produce any printed

papers? A. He had this form with him and I know there were two or three signatures required
 • • •”

Folio 735:

“A. I gave them to Mr. Coccaro and he signed them.”

Folio 737:

“Q. Was there anything said at that time or immediately prior to that time that those papers were signed, about the signature or about the contents? A. I looked over the papers.

Q. Tell us what you said, as nearly as you can remember the words. A. As near as I can remember it, I asked Mr. Cosgrove what was the idea of all those papers and he told me that this was a form that was given to them by their attorneys and the reason for doing it was to comply with the law.”

Thus, in addition to interest upon the advances or loans (which current interest above was in most instances in excess of 6%), Coccaro was required to pay an additional sum of 3% per year to respondent *for making the loan*, besides brokerage fees for discounting its paper. Coccaro was likewise required to pay excessive commissions to one Surprenant who represented respondent as broker, thus bringing up the total rate paid by the borrower to from 20% to 23% i. e. current interest $5\frac{1}{2}$ to 7%, respondent's commissions 3; brokerage to Lewis $1\frac{1}{2}$; Surprenant 12. Even assuming that Surprenant's charge is not attributable to respondent the latter required the borrower to pay from 10% to 12% per annum.

There was much other testimony to show usury. The question as to whether it existed or not was left to the

jury by Mack, J., in a careful charge (fol. 989) and the jury found in favor of petitioners.

Upon all of this record, the Circuit Court of Appeals in its opinion says—nevertheless:

“We see nothing in evidence which raised an issue of fact that this transaction was otherwise than is claimed by the plaintiff-in-error * * * below there was a failure to distinguish between a loan of money and a loan of credit,”

and also:

“We hold that this transaction is not usurious.”

The Circuit Court of Appeals in reaching this conclusion held empirically, that the transaction in question was a loan or sale of plaintiff's credit because it issued its *note* rather than its *check* to the borrower. In this connection the Court said:

“The plaintiff-in-error's contract and methods of transacting its business has met with the approval of the highest Court of Pennsylvania. *Righter & Sowgill v. Philadelphia Warehouse Co.*, 99 Penn., St. 289.”

The case referred to is erroneously cited by the Court, the correct title being *Righter & Cowgill v. Philadelphia Warehouse Co.*, 99 Penn. St., 289. In fact it did not hold any such proposition as will appear from a reading thereof.

Respondent's “method of business” was to issue its own note to a note broker, S. B. Lewis & Co. of Philadelphia—selected by it and till then unknown to the borrower. Lewis discounted the note and turned the proceeds over to the borrower—an evidently transparent scheme.

No case in this court is cited in the opinion holding that a Court will distinguish a transaction as a loan of credit rather than a loan of money, as matter of law; or that any Court has approved any business firm's "contracts and methods of transacting business" to such an extent that they may be used under any circumstances without being subject to the usury statutes.

The cases cited in the opinion are decisions of the lower Federal Courts, not in point on the issue involved, but the authorities which we have collected in our brief point out that the "loan of credit" theory has furnished so convenient a device to avoid the usury statute, and is so subject to abuse and consequent suspicion, that it is always a question of fact for the jury whether it was not a mere cover for usury. The opinion of the Circuit Court of Appeals thus lays down a new rule of law, contrary to all other decisions by holding that the form of a transaction governs as a matter of law, rather than the actual intended fact.

Incidentally, the opinion of the Circuit Court of Appeals (though founded directly upon the conclusion that the transaction was a loan of credit and therefore not usurious), suggests that the transaction was governed by the Pennsylvania statute and not by the New York statute, because Coccoaro, the borrower, had to repay the amount of the loan to the respondent at its office in Philadelphia, although the "deal was closed" (Record, fol. 409) in New York City, where respondent advertised for the making of "Time Loans on Merchandise," and where its secretary came to arrange the transaction with Coccoaro.

Petitioners represent that, although this suggestion of the Court is merely incidental, it is likewise erroneous, and that a transaction cannot be saved from the operation

of the usury statute merely be making repayment of money in another state.

Petitioners claim that the verdict of the jury was amply justified by the evidence; that the Trial Court correctly charged the law and that petitioners have been deprived of their Constitutional right to have questions of fact passed on by a jury by the action of the Circuit Court of Appeals.

Your petitioners respectfully represent that the alleged principles upon which the decision is based are erroneous, subversive of commercial usage and legal precedent, and amount in effect to a judicial annulment of the usury statute.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, and to the end that the same may be reviewed and determined by this Court in conformity with the provisions of the Act of Congress in such case made and provided; and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate, and in conformity with the said Acts, and that said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

SEEMAN BROTHERS,

By SIGEL W. SEEMAN,
a member of said firm.

State of New York,
County of New York—ss.:

SIGEL W. SEEMAN, being duly sworn, deposes and says that he is one of the petitioners in the foregoing petition: that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SIGEL W. SEEMAN.

Sworn to before me this
13th day of August, 1925.

SAUL ADELMAN,
Notary Public,
New York County.

I hereby certify that I have examined the above named petition, and that the allegations of fact contained therein are true, and that said petition is in my opinion well founded in point of law, and that the case is one in which the prayer of the petition should, in my belief, be granted by this Honorable Court.

SAMUEL F. FRANK,
Counsel for Petitioners.

AUG 15 1925

WM. R. STANS

No. 6 198

IN THE
Supreme Court of the United States,

OCTOBER TERM—1925.

JOSEPH SEEMAN, *et al.*,

Petitioners,

—against—

PHILADELPHIA WAREHOUSE CO.,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

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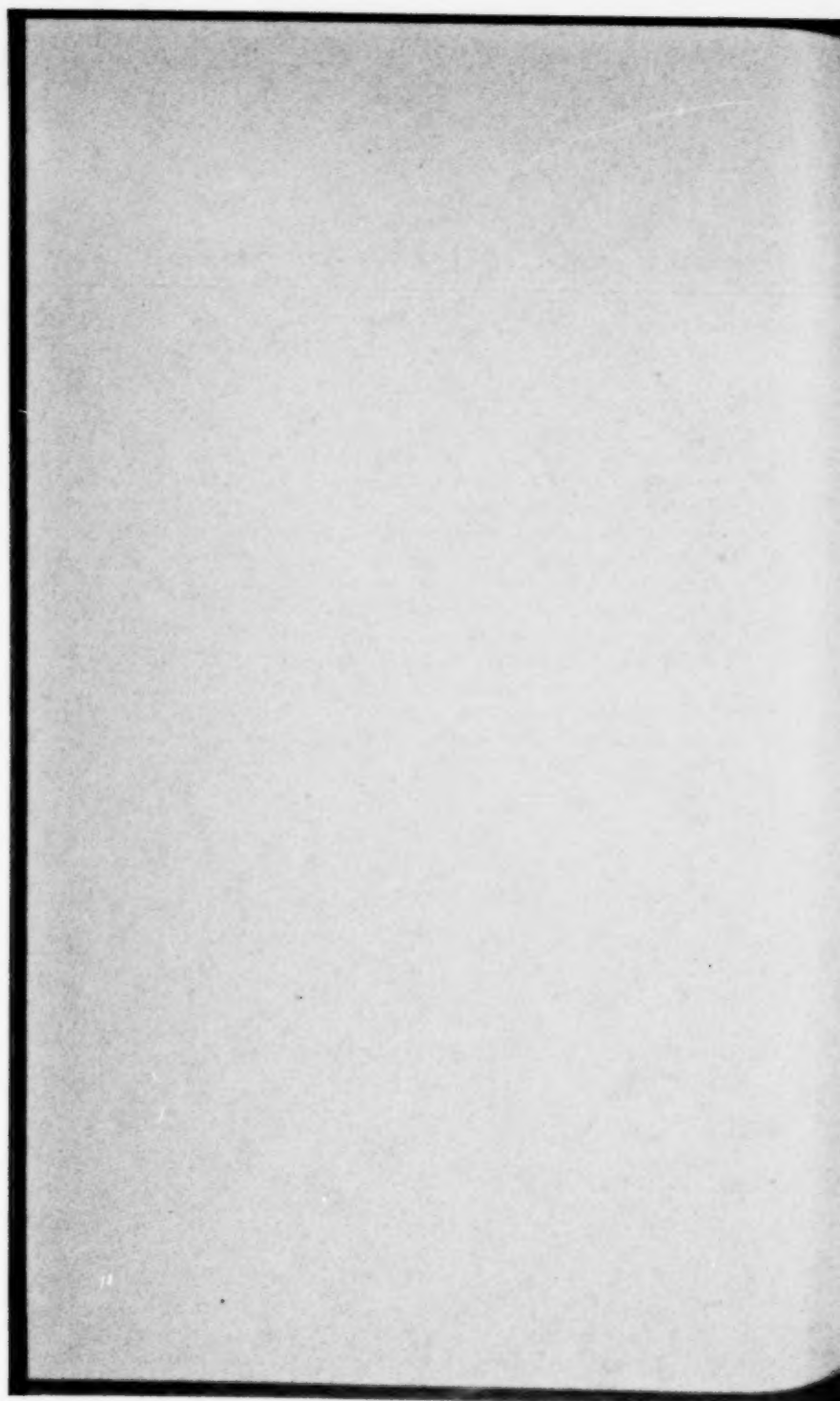
WILLIAM N. COHEN,

SAMUEL F. FRANK,

HARRY J. LEFFERT,

ARTHUR W. WEIL,

Of Counsel.



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IN THE
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—against—

PHILADELPHIA WAREHOUSE CO.,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

Statement.

Petitioners ask this Court to review a judgment of the Circuit Court of Appeals for the Second Circuit, reversing a judgment in favor of defendants—your petitioners—which was entered upon the verdict of a jury after a trial before Circuit Judge Julian W. Mack.

The opinion of the Circuit Court of Appeals concludes by saying (MANTON, *J.*, writing):

“The only defense urged below is that of usury. We hold that this transaction was not usurious and judgment should have been directed for the plaintiff-in-error.”

Therefore, it will be seen that the ruling complained of practically disposes of the case unless a review is granted by this Court.

Petitioners urge upon this Court that a review is particularly necessary in the present case for the following reasons:

1. That numerous other actions—now awaiting trial—for which the present one was a test case—are dependent upon the outcome of this appeal.

2. That the decision of the Circuit Court of Appeals introduces a novel and dangerous doctrine, in that

(a) It interprets the usury statute of the State of New York in a manner directly contrary to the interpretation thereof by the courts of that state; and of the decisions of this Court, notably *Andrews v. Pond*, 38 U. S. (13 Peters) 65.

(b) It declares, as matter of law, that certain transactions which the jury found to be *in fact usurious*—were not usurious—in violation of Section 1011 of the Revised Statutes (Compiled Statutes §1672); and, in effect, annuls the usury statute of the State of New York.

The Facts.

Petitioners, under the name of Seeman Brothers, have for many years been engaged in the wholesale grocery business in New York City (fol. 701).

On February 17, 1920, they saw an advertisement in the New York "Journal of Commerce," offering for

sale some 1000 cases of salmon (fol. 705) which it appears, was the same lot of salmon to which respondent claims title in this action. Petitioners bought the salmon from A. J. Coccaro and paid for it in full (fol. 707), concededly without knowledge of the alleged rights of respondent and in entire good faith (fol. 706).

More than a year after this purchase and payment by petitioners, respondent for the first time (on March 11th, 1921), made claim upon petitioners for the 999 cans of salmon or its value.

Respondent claimed title to the salmon by virtue of a "pledge contract" (fols. 1057 to 1068) of the goods in question executed to it by one Coccaro simultaneously with his obtaining loans from it against such merchandise, which respondent offered to make in the following advertisement:

TIME LOANS ON MDSE.
in any responsible warehouse
at $\frac{1}{4}\%$ per month over lowest rate
for best commercial paper
No rehypothecation of notes or mdse.
No deposit balance to be maintained.
Interest allowed on prepayments for
releases of mdse.
Philadelphia Warehouse Company
3rd & Chestnut Sts., Phila.
Capital \$1,000,000 Surplus \$1,000,000
Established 1873.

Respondent issued its own note to a note-broker, who caused it to be discounted and transmitted the proceeds of such note to Coccaro. This note-broker, S. B. Lewis & Co., also of Philadelphia was previously unknown to Coccaro, was designated by respondent, which required

Coccaro to sign a printed authorization designating Lewis as his representative for such purposes (fol. 425).

Respondent contended that this procedure constituted a "loan of credit" rather than a loan of money, and did not, therefore, come within the purview of the usury law; through the rates paid by Coccaro exceeded the legal rate of 6% per annum, to-wit, a fixed rate of 3% to respondent, plus the current interest rate, varying from 5½% to 7%, plus brokerage and other charges.

Petitioners claimed that there was a clear case of a usurious loan, only transparently covered by respondent's device of issuing its *note* instead of its *check*, and that, therefore, the transaction was void as to Coccaro, and consequently, as to petitioners whose title was derived from him.

In our brief below, we summarized our contention as follows:

"Whether plaintiff's astute attorneys have devised a method of lending money which will protect it from the usury statute or not, no amount of explanation can gloss over the fact that—for all practical purposes—it *is* lending money without supervision or protection of the banking law in any state.

We cannot resist the conclusion expressed in *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 149:

'It has been said and reiterated by the courts, from the time the schemes and contrivances of lenders became the subject of judicial examination, that there is no contrivance whatever by which a man can cover usury (*Jeston*

v. Brooke, 2 Cowp. 793), and that no subterfuge shall be permitted to conceal it from the law (DeWolf v. Johnson, 10 Wheat. 285), yet if this agreement can stand it will require no wit or subtilty to circumvent the statute'."

Nevertheless, the Circuit Court says in its opinion here,—

"The business of plaintiff-in-error for fully half a century had been to loan its credit by *delivering its promissory note to a merchant who pledged with it merchandise to insure payment of the merchant's note at maturity. The pledgor received a note which could readily be turned into cash by its sale through note brokers, through various banks throughout the country. * * ** The charge for issuing its promissory note against the pledge of the merchandise in a public warehouse *was three per cent. per annum upon the face amount of its notes so issued. * * **

The three per cent. per annum paid to the plaintiff-in-error upon the face of the note was to cover its services for advancing their credit; that is, issuing the notes and for such other services in connection with the security as might be necessary. Six per cent. was a lawful rate of interest; the compensation paid to the plaintiff-in-error was a return for the issuance of its note, for its obligation to pay and the chances of reimbursement from the borrower. We see nothing in the evidence which raised an issue of fact that the transaction was otherwise than as claimed by the plaintiff-in-error." (Italics ours.)

The foregoing statement of the Court really begs the question. It assumes that, *merely* because respondent made its own promissory note (whether discounted

by itself (fols. 372-373) or by note brokers used by it regularly) the transaction was a "loan of credit," though admittedly, if it had issued its check instead, it would have been a loan of money. Whether it was really a "loan of credit," or simply a device to give a different name to an ordinary usurious loan, was to be determined, from a decision as to

(1) whether the mere issuance of a note, even in good faith, would *ipso facto* be a "loan of credit," and

(2) whether, from all the dealings between the parties such good faith appeared—or whether the form of the transaction was a mere subterfuge. This latter issue was to be determined from all the facts and circumstances in the case; not from an assumption based on the mere form of papers prepared by respondent, in disregard of the testimony showing the actualities of the transaction.

POINT I.

The holding of the Circuit Court of Appeals that, as matter of law, respondent did not violate the New York Usury Statute, because it issued to the borrower or to its own bank its *note* instead of its *check* amounts to a judicial repeal of the New York Usury Statute; and in view of the finding of the jury, sustained by the trial Judge, that the transaction was *in fact* a usurious loan, exceeds its jurisdiction as limited by Section 1011 of the Revised Statutes.

The record makes it perfectly evident that respondent is a money-lending institution. The opinion of the

Court of Appeals describes it as "a corporation doing a warehouse business" in Pennsylvania—an *evident error*, as the record shows *it has no warehouse and never operated one anywhere* (fols. 424-425), nor is it licensed to do business under the banking laws of either New York or Pennsylvania. Whatever forms or methods it has invented, cannot conceal the fact that it was doing what it advertised to do, *i. e.*, making "Time loans on merchandise," (Ex. H, fol. 1339).

At best it is difficult to draw a distinction (if there be any) between the legal or logical effect of respondent's carrying out its arrangement with the borrower—Coccaro—by sending him its own *check*, drawn upon its own bank (which would be a loan) or providing the funds for the same purpose by discounting (or having a broker discount) its own note so that the proceeds reached the borrower (which it called a "loan of credit"). In this case Coccaro issued no notes. Respondent neither endorsed nor guaranteed any notes for him, but got money to him by discount of its own notes. Thus the asserted distinction between lending its credit and lending money to Coccaro reaches the verge of disappearance.

Indeed, respondent never even gave its notes to the borrower, Coccaro, but sometimes direct to its own bank and in other cases to S. B. Lewis & Company, note brokers selected by respondent itself (fols. 419-420). These brokers handled transactions amounting to millions of dollars, and respondent used printed forms as part of a regular routine, purporting to have the borrower name S. B. Lewis & Co. as agents of the borrower to discount respondent's note (fol. 425). *So transparent and creaking a device did not fool the business*

men on the jury; but its significance evidently escaped the attention of the Court below.

The opinion below cites no case in this Court which has sustained a distinction so purely arbitrary and formal, *i. e.*, that issuing a *note* instead of a *check*, in the first instance, can save what is in effect a usurious loan from the consequences of such a transaction.

The Circuit Court cites three cases in support of its assumption that a "loan of credit" justifies any charge or rate of interest. Two of these cases in the lower Federal courts illustrate the difference between where there were real "loans of credit" and the Court's assumption that there was a loan of credit in the present case, merely because *notes* were issued instead of *checks*.

In *Ryttenberg v. Schefer*, 131 F. R. 313, decided in the District Court, a commission house, acted as factor, for a business house.

Holt, *J.*, said :

"Schefer, Schramm & Vogel guaranteed the consignments, and permitted Radon' & Co. to have the benefit of the name and credit of their house under the arrangement made. The contract was a genuine business arrangement, of mutual advantage to both parties, and not a mere cloak to cover usury."

Title Guarantee & Surety Co. v. Klein, 178 F. R. 689, was decided in the Circuit Court of Appeals, Third Circuit.

An obligation for the payment of money, (*i. e.*, *not the lender's own note*, but United States Government 3%

bonds) were sold, with an agreement to redeliver. The Court said:

"The United States bonds that were the subject of this loan * * * were subject to fluctuation and for that reason among others were not to be regarded as a loan of money."

The theory on which that transaction was sustained is inapplicable to the case at bar; for there could be no "fluctuation" in the value of respondent's own note. * * * At maturity, it had to be paid in full, and respondent would then be in the same situation whether it "loaned" or delivered to a borrower, in the first instance, its note, its check or its cash.

In *Meeker v. Fiero*, 145 N. Y. 165, a loan had long since been made with a mortgage for security. The borrower desired the lender to surrender the security and take another security in place for it, and the Court held that this was

"simply a change of security for an existing debt and that S—— could lawfully demand compensation for assenting to the transaction."

None of these cases on the facts, or by analogy of reasoning justifies the conclusion of the Circuit Court that a similar "loan of credit" existed in the case at bar. In each of the cases cited none of the parties had in view or contracted to get or borrow money through any means or by any plan. In the case at bar, no matter how respondent sought to conceal it, the sole aim in view was for the borrower, Coccaro, to get a loan of money on his merchandise. The machinery by which

respondent obtained the money to make that loan (whether by issuing its note and discounting it itself or by having it sold by a broker or by drawing its check) was of no interest to the borrower, but simply the concern of respondent as to where and how it could get the money in accordance with its agreement to make "time loans on merchandise."

We submit that it is equally plain in the case at bar that when respondent issued its *notes* to the end that Coccaro should get the proceeds, it was as much a loan, as if it issued its *checks* directly to him.

This Court has never approved so unreal a distinction as that drawn by the Circuit Court of Appeals; and the authorities in point illustrate that—if the "loan of credit" theory can be sustained at all in a case like this—it can only be sustained when the jury is convinced that the transaction was not really intended as a loan.

"But if the transaction is in fact a loan or forbearance, the lender cannot, by giving to it the form of a sale or credit, prevent it from falling within the prohibition of the usury statutes; and it has been said *that transactions in the form of a sale of credit are to be viewed with great jealousy, as they are extremely liable to be perverted to usurious purposes.* After a person has accepted a bill or indorsed a note for another, his subsequent payment of such bill or note is a loan or advance, and he cannot, in addition to the maximum rate of interest on the money so loaned or advanced, charge a compensation for such loan or advance without rendering the transaction usurious."

29 American English Encyclopedia Law, 472,

citing *Beckwith v. The Windsor Manufacturing Co.*, 14 Conn., 605, where the Court says:

"The question whether the transaction was fair, and *bona fide*, or a cover for usury was submitted to the jury, and they have found in favor of the validity of the transaction, judgment was rendered accordingly—page 606.

Should it be said that great danger may be apprehended from the perversion of such contracts to usurious purposes, the answer is, that whenever they are so perverted, they will be void. The intent of the parties in making the contract must govern; and that is a question of fact, to be determined by that tribunal whose business it is to pass upon such matter; and if an usurious intent is found, it will vitiate the contract."

In *Carstairs v. Stein*, 4 Maule & S. 192 (105 Eng. Reprint, 805), Lord Ellenborough aptly remarked:

"Commission cannot be added to the amount of legal interest for the purpose of inducing a loan of money to be made and of recompensing it afterward, when made. All commission, where a loan of money exists, must be ascribed to and considered as an excess beyond legal interest, unless as far as it is ascribable to trouble and expense, *bona fide* incurred, in the course of the business transacted by the persons to whom such commission is paid * * *

These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a colour for usury upon loans which were stipulated not to be required but were in fact required, and made from the beginning to the end of this business.

But the question, i. e., whether colour or not, was a question for the consideration of the jury
 * * * The jury having drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw, and they having done so, we do not feel ourselves, as a Court of Law, but acting according to the rules by which Courts of Law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

The opinion just cited shows the inapplicability of the case upon which the opinion of the Circuit Court of Appeals seems entirely founded.

In that case (*Richter & Cowgill v. Philadelphia Warehouse Co.*, 99 Penna. State, 289) the Pennsylvania Court held *on the record there before it* that the 3% charged by respondent represented actual services performed in the care of collateral which services were testified to by witnesses (see Opinion, 99 Pa. State, top of 294), and that there was no evidence at all of any other agreement than the papers offered by the respondent (see p. 294).

The record in the instant case, however, showed that no expenses were incurred by respondent for the care of collateral (fols. 494-498), and that the 3% was really for additional compensation over and above 6% for loaning out money.

As said in *Hooley v. Talcott*, 129 App. Div. 233, by the New York Appellate Division:

"In all these transactions Talcott was acting as a money lender solely * * * There were

no dealings between Talcott and Scherr pursuant to which any moneys became due from Scherr to Talcott other than these loans made pursuant to the general arrangement between Bush, Scherr's agent, and Talcott. The net result of these transactions was that Talcott received amounts aggregating something over 9% to something over 12% per annum, the interest and commissions in all cases being paid in advance * * * *It appears that the alleged commissions were a fixed percentage of one-quarter or one-half per cent., a month for the amount loaned either deducted from the amount loaned or paid in advance, and regardless of whether there were any appraisals or substitution.*"

This New York case—completely ignored by the Court below—although stressed in our brief and relied on by the Trial Judge (fol. 971) as a controlling authority, indicates the inapplicability of the *Cowgill* case to the facts in this record; for here also, as in *Hooley v. Talcott*, the "fixed commission" of 3% was payable regardless of, and not as compensation for, any actual care of collateral or other services, not rendered, nor ever intended to be.

Section 1011 of the Revised Statutes (Compiled Statutes Sec. 1672) reads:

"Reversals on Error Limited. There shall be no reversal in the Supreme Court or in a Circuit Court of Appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea of jurisdiction of the court, or for any error in fact."

There is no different rule of law as to the weight of evidence to be applied to the issue of usury than that concerning evidence in any other civil action.

29 Eng. & Am. Encyl. of law, page 542, notes 9 and 13.

In *Kurtz v. Doerr*, 180 N. Y. 88, the New York Court of Appeals said:

"We deem it very important that the strict rule of evidence, applicable to the burden of proof in criminal cases, should not be extended to civil action for the recovery of damages, where the defendant is charged incidentally, with arson, embezzlement or any other crime."

This Court in the leading case of *Andrews v. Pond*, 13 Peters 65, at page 76, said:

"But although the transaction, as exhibited in the accounts, appears on the face of it to have been free from the taint of usury, yet, if the ten per cent., charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usurious agreements; and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself. But whether this item was intended as a cover for usury or not, is a question exclusively for the jury."

This is precisely contrary to the decision of the Circuit Court of Appeals herein, and was not considered in its opinion.

Unless the assumption of the Circuit Court of Appeals is correct, that merely because respondent issued its note instead of its check to a person seeking to obtain "TIME LOANS ON MERCHANDISE" the transaction is conclusively stamped a loan of credit—all the circumstances in the transaction were to be considered by the jury and by them *exclusively* under the decision of this Court just cited.

Without repeating the testimony at length we may recall the attention of the Court to respondent's advertisement, offering "Time Loans on Merchandise" which is the beginning of the transaction, to the admissions of plaintiff's own secretary, Cosgrove, who came to New York to interview the borrower, Coccoaro.

(Fol. 498, fol. 307, fol. 501, fol. 406, fol. 407, fol. 408, fol. 409, fol. 412, fol. 425, fol. 428); and to the testimony of Coccoaro's employee, McAndrew, corroborated by the records of the business and the inferences from Cosgrove's admissions and half-truths (fols. 726, 728, 733, 735, 737).

We submit that this testimony, beginning with Cosgrove's admission (fol. 498):

"Q. When you spoke to Coccoaro he wanted to borrow money, did he not? A. As far as I can recall, yes.

Q. And he applied to you for a loan of money, did he not? A. He did."

shows that Coccaro got from respondent what he wanted, a loan of money, despite the fact that Cosgrove recited to the borrower a "set form of words" which respondent employed in all such transactions (fol. 501) by using papers prepared by respondent's attorney to comply with the law (fol. 737); and that there was a distinct agreement (fols. 728-9-30) for the lending and borrowing of money at rates in excess of those allowed by the usury statutes of the State of New York.

We submit that disregard of this testimony and of the jury's findings, that in fact a loan of money was made and intended, is in violation of the statute quoted, especially where there is nothing to the contrary but the assumption of the Court below, that because respondent issued its *notes* in the first instance instead of its *checks*, the transaction must necessarily be regarded as a "loan of credit."

POINT II.

The question of the Conflict of Law was to be resolved by the Usury Law of the State of New York where the transaction took place.

Although the Court below founded its opinion squarely on the fact that the transaction was not usurious, it suggested incidentally that it was governed by the Pennsylvania statutes, which do not forfeit the principal and not by the New York statutes, which do.

This conclusion the Court based upon its assertion that the form used by respondent required the borrower

to repay the money to it in Philadelphia and that the contract was not complete until respondent delivered its notes to the note-broker Lewis in Philadelphia.

The following facts summarize what was done in New York in this case:

1. Respondent advertised in the New York Journal of Commerce offering merchants in New York "time loans on merchandise" (Exhibit H, fol. 1339);

2. Respondent was doing business in New York with merchants other than Coccoaro (fols. 417, 471, 894);

3. Cosgrove, respondent's secretary, usually came to New York to transact such business for it (fols. 405, 894);

4. Cosgrove, was *authorized to*, and did, arrange for and *complete* transactions with respondent's customers in New York (fols. 402, 417);

5. Cosgrove met Coccoaro (or McAndrews, his confidential man) in New York for the purpose of discussing arrangements by which Coccoaro could get money (fol. 405);

6. Cosgrove admitted that in New York Coccoaro squarely asked him for a loan of money fols. 498-501) for which he was willing to give merchandise in the warehouse as collateral (fol. 501) in New York;

7. Cosgrove in New York stated to Coccoaro the terms of the transaction, the rate at which plaintiff would advance the money, to wit: $\frac{1}{4}$, $\frac{1}{2}$ and 1% and that it would not make the loan

except through Surprenant and upon payment of a "commission" to the latter (See McAndrew, fols. 728-730);

8. That in New York respondent's printed forms of "pledge contract" and the ostensible request to the note-brokers to sell the notes, were signed by Coccoaro (fol. 426) and delivered to Cosgrove (fols. 412 and 440);

9. That at the same time bill of lading for the merchandise was delivered as collateral to Cosgrove in New York (fol. 961);

10. That checks for $\frac{1}{4}$ of 1% plus stamp tax were then delivered to Cosgrove in New York (fol. 428);

11. That it was then arranged in New York that respondent would advance moneys to Coccoaro provided an investigation showed that Coccoaro's representation as to the value of the security was substantiated (fol. 307);

12. That such investigation as to the valuation of the merchandise was made by Cosgrove himself in New York (fol. 408); before he returned to Philadelphia (fol. 308);

13. That the net proceeds of the notes obtained on respondent's notes were transmitted to the Irving National Bank in New York with instructions to deposit the same to the account of Coccoaro, pursuant to an agreement to that effect (fol. 430);

14. That respondent maintained an account in the Chase National Bank in New York (fol. 461) and that payments by Coccoaro on account

of respondent's advances were made by depositing the same in its said account in that bank in New York (fols. 461, 466-467, 510, 537).

This identical situation was considered in *Hooley v. Talcott* (*supra*).

In that case, Talcott made arrangements with Bush, the New York agent of a Philadelphia merchant named Scherr. The arrangement was that Scherr was to obtain moneys from Talcott and pay him therefor 6% interest and a commission of from one-quarter to one-half per cent. per month (See Opinion, p. 234). This arrangement was made in New York City. The method of making these loans was in every instance substantially the same. Scherr signed and endorsed blank notes and sent them to Bush in New York. Bush filled them in, *dated them at Philadelphia, payable to Scherr at a bank in Philadelphia*, and then delivered them to Talcott. Talcott thereupon gave his check to Scherr, either for the full amount of the loan or for the amount of the loan less interest and commissions. As security for these loans, silk belonging to Scherr stored in a warehouse in New York, was turned over to Talcott as collateral security.

The Court in summarizing the facts said:

"The application for the loan was made by the borrower's agent to the defendant in the city of New York; the agreement entered into upon such request was made in the city of New York; the notes, though made payable, for the convenience of the borrower, at a bank in Philadelphia, were delivered to the defendant by the

borrower's agent in the City of New York; the interest and the so-called commission was paid to the defendant in the City of New York; the money loaned was in possession of the defendant in the City of New York, and although the checks representing the same were sent to the borrower in Philadelphia, those checks were paid by the money of the defendant in the City of New York, and the goods—the collateral security for the repayment of such loans, were actually stored in the City of New York. *It seems to me that upon the whole transaction there is no doubt that the agreement at bar was a New York contract. The contract was for the loan of money upon the security of warehoused merchandise. The minds of the parties upon that contract met in the City of New York, where the agreement to loan upon such security was made."*

At page 240 the Court said:

"The rule deducible from all these cases is that the whole transaction will be looked into to ascertain where the real contract the meeting of the minds, simply evidenced by the instrument, took place. When that is ascertained neither the date of the instrument, where signed, or where payable, is controlling. In the cases cited the instruments though signed and made payable in New York, were held not to be New York contracts because the agreement which they evidenced took place elsewhere. The converse must be true. *As in the case at bar the agreement to loan money and to deposit goods as collateral security took place in New York the contract was a New York contract though*

the notes evidencing that transaction were signed and made payable in Pennsylvania."

This conclusion is sustained by other authorities.

Wayne County Savings Bank v. Lowe, 81 N. Y. at page 571.

In *Andrews v. Pond*, 38 U. S. (13 Peters) 65 this Court said:

"The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of security taken upon a usurious agreement which neither will execute? *Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a bona fide agreement made in one place to be executed in another.* In the last mentioned cases the agreements were permitted by the *lex loci contractus*; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the

place where the contract was made. If void there it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

In the present case, nevertheless, the Circuit Court of Appeals said that:

"The loan did not have its inception in New York nor was it completed in New York. The transaction was carried out in Philadelphia. * * * The pledge agreement was drawn and dated in Philadelphia; the contract was a unilateral one and did not become binding in its terms until the plaintiff-in-error issued its note; that act was done in Philadelphia."

We submit that this conclusion is squarely contrary to the evidence above referred to, and to the decision in *Hooley v. Talcott* (*supra*).

For the purpose of having the testimony on that point clearly before the Court, we reprint it as follows:

Fol. 409:

"Q. So, then, I am correct in stating that in each one of those transactions that are included in this bill of particulars of yours, you came to New York City, and made the arrangement with Coccaro, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods, then *the deal was closed so far as the arrangement between you and Coccaro was concerned?* A. *So far as the agreement to do what we undertook to do was concerned.*"

Folio 412:

"Q. These papers that you gave to Coccoaro were shown to Coccoaro, and you had him sign, and he signed in your presence in New York? A. That is correct."

Folio 307:

"A. I said that if the salmon were found by us to be substantiated as to the value set on it by him, from inquiry made *by me* in the trade *that day*, I would, upon my return to Philadelphia the *next day*, see that the note called for was issued."

Folio 407:

"Q. In other words, when you left Coccoaro's office that day *that was a deal that was closed*? A. No, I beg your pardon; subject to a satisfactory appraisal and examination of the collateral."

Folio 408:

"Q. *You* did that likewise, did you? A. Yes, *I did*."

We submit that this makes it perfectly clear that there was a final and binding agreement to loan money (or issue a note" as respondent contends) between the parties in New York, made between Cosgrove, plaintiff's Secretary, who was in full charge and authority in the matter, and Coccoaro (fol. 402); the deal was closed. It was only subject to the same man's (Cosgrove) making a satisfactory appraisal of the collateral which he, Cosgrove, did in New York that day (fol. 437) *before returning to Philadelphia.*

CONCLUSION.

The opinion of the Circuit Court of Appeals, and its actual holding in the instant case, affects interests more diverse and a much larger number of citizens than the parties to the present case and the other cases now pending. We know of no other decision in which a Court of high authority has issued an open patent or approval to "the methods and contracts" of any money lending institution, such as the Circuit Court of Appeals does in the instant case.

The opinion, indicating as it does that the usury statutes can be circumvented by the simple device of having the lender issue a *note* instead of a *check*, is an open invitation to a growing business evil which has brought ruin and bankruptcy in its train.

Petitioners do not present the issue of the wisdom or propriety of the usury statutes. They are upon the statute books of the greatest commercial state in the Union, and, in conformity with them, business involving millions of dollars yearly is transacted.

These petitioners, reputable business men of many years standing, are not here trying to evade any agreement; but, as concededly innocent victims of a rule of law, which permits them to be held liable for conversion of goods, a year after they purchased it in the open market, through public advertisement in the usual New York newspapers, they point out that the claim on which they are sought to be held is based upon a transaction prohibited by statute. If that statute is drastic in its terms, the hardship imposed upon them by such rule of law is no less severe.

We respectfully submit to this Court, that the opinion of the Circuit Court of Appeals is not only erroneous and in conflict with the decisions of the New York Courts interpreting their own statutes, but is based upon an artificial and illogical distinction which is bound to cause confusion in the commercial world, and to lay the foundation for endless future litigation until it be authoritatively repudiated.

We submit that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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1 No. 198

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IN THE
Supreme Court.
OF THE UNITED STATES.
OCTOBER TERM, 1926.

JOSEPH SEEMAN, *et al.*,
Petitioner,
—against—
PHILADELPHIA WAREHOUSE Co.,
Respondent.

REPLY BRIEF FOR PETITIONERS.

COHEN, COLE & WEISS,
Attorneys for Petitioners.

SAMUEL F. FRANK,
HARRY J. LEFFERT,
ARTHUR W. WEIL,
Of Counsel.



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REPLY BRIEF FOR PETITIONERS.

POINT I.

The cases cited by respondent (Brief, p. 32) in support of its point that the Circuit Court of Appeals could reverse the verdict of the jury on the facts—despite §879 Judicial Code—do not sustain its contention.

Houghton v. Burden, 228 U. S. 161 was an appeal from the decision of the Court without a jury, in a *bankruptcy* proceeding. This Court held, re-

ferring to the bankruptcy statutes and equity rules (at p. 165) :

"Upon such an appeal the law and the facts are open for re-consideration." (Italics counsel's.)

At page 164, it expressly indicated that its ruling would have been otherwise had the appeal been taken from the verdict of a jury in an action at law.

Baltimore & Ohio R. R. v. Groeger, 266 U. S. 521 was an action for negligence based on the claim that a railroad did not use an improved mechanical device. It was undisputed that the competent engineers of the railroad had exercised their best judgment in retaining the old equipment. This Court held that neither the Court nor the jury could substitute their judgment as to the advisability of using new devices, for that of competent engineers. *No question as to the weight or sufficiency of evidence was passed on.*

Ziang Lung Wan v. U. S., 266 U. S. 1 was a criminal case where a confession was extorted from the defendant and this Court reversed a conviction based upon the evidence so improperly received.

Southern Pacific v. Poor, 160 U. S. 438 was another case where the facts were substantially *undisputed*; and this Court held that what constituted negligence was a question for the Court.

None of the cases cited, and no other decision of this Court which we have seen, justified the Circuit Court of Appeals in disregarding the plain

mandate of Section 879 in a case where the acts and *intent* of the parties were to be determined upon conflicting evidence, as in the case at bar.

POINT II.

Respondent's argument that the Circuit Court of Appeals could treat evidence which it considered improbable as no evidence at all (Brief, pp. 14-19) and thus violate the statute by indirection, is wholly untenable.

The authorities cited in our main brief clearly hold that the jury was the proper arbiter to determine whether there was really a loan of money in the present case. Respondent makes no criticism of these cases; but argues that the evidence of the witness McAndrew was highly "improbable" (brief, bottom p. 15); that the Circuit Court of Appeals could therefore ignore it (despite the fact that the jury believed it), and could proceed as if there were *no* evidence on petitioner's part (p. 18). But the probability or improbability of testimony is always a *question of fact*, and peculiarly within the province of a jury.

As was said in *People v. Becker*, 215 N. Y., at page 135:

"The sum and substance of the argument is that it is impossible to believe that Becker would have been so foolish as to order or induce the murder to be committed at a time when he himself would almost

certainly be the one man in the City of New York who would be suspected of complicity therein.

This was a proper matter to be considered by the jury and we must assume that they considered it. It cannot be laid down as a matter of law that a jury is bound to hold that a specified event has not occurred because the occurrence involves unwise or foolish or blundering conduct on the part of the accused person."

In support of its argument on this point, respondent cites *Houghton v. Burden (supra)*, evidently overlooking the distinction we have pointed out, that *there* the Circuit Court of Appeals was re-considering the *facts* by statutory authority. The case is, therefore, not a precedent here; moreover, the language quoted (*i. e.*, that of Coxe, *J.*, in the Circuit Court of Appeals), was used with reference to an entirely different situation from that in the case at bar.

In that case, a retired business man and accountant made a loan secured by a Fidelity Bond. A condition of the bond required monthly inspection of the borrower's books showing assigned accounts. This work the lender agreed to do for a compensation, which, the District Judge found (p. 171), was a fair return therefor. The borrower testified that no such services were expected, or required; that this agreed compensation was a mere cover for usury, and that the lender had declared this to him in so many words. The Court pointed out that the lender's failure to inspect the books would have voided the bond, and

that the alleged admission that the provision for compensation was a mere device to avoid the usury law, was against the weight of evidence.

In the present case, every probability is that just what McAndrew says, did actually occur. It was perfectly natural for him to ask Cosgrove the purpose of the unusual papers the latter required him to have signed and the circuitous procedure to be followed; what answer could the latter have given than what McAndrew says he made—that they were forms respondent's lawyers had prepared to comply with the law (R., 197). Thus in the case cited, the asserted admission was that the transaction was illegal, while in the case at bar, the statement referred to asserted legality. *That is practically what respondent's counsel say to this Court on the present appeal.*

The only difference is that, counsel argue that these papers necessarily constitute the agreement, although the evidence shows the *reality* underlying the printed form.

We deem it proper at this point, however, to correct a misleading reference to McAndrew's testimony in respondent's brief at page 15. It quotes the latter as saying that "he never negotiated a loan", and argues therefrom that his testimony as to negotiating the loan in question must be untrue. A reference to the record (R., 238) shows that this answer was in reply to a question as to what *other* firms he had negotiated with "*besides*" respondent.

We believe that a reading of all the testimony would show that on the material points McAndrews' testimony is consistent and corroborated by the probabilities.

The record shows that he was drawn into the matter only because his employer Coccaro wanted to avoid paying a commission to Surprenant (R., 195), which endeavor was defeated by Cosgrove's insistence that he would make the loan only upon condition that a "commission" was paid to Surprenant.

The documentary evidence shows that he took *some* part in the transactions, as his signature appears upon Exhibit "B", which he signed at respondent's office in Philadelphia on November 8th, 1919 (R., 190-191). The admissions of the respondent's Secretary, Cosgrove, on cross examination, and the terms of its advertisement, all tend to show strongly that what both parties really *intended to do* and *did*, was to arrange to lend and to borrow money, respectively.

Without repeating the testimony on this point, quoted in our main brief (pp. 4, 5, 26, 27, 28, 33, 34 and 35), we submit that there *was* evidence before the jury which the Circuit Court of Appeals could not disregard.

POINT III.

The cases cited by respondent to support its contention that, as matter of law, there was no usury in the transaction under review, even if construed as a loan of money, are clearly distinguishable.

In all the cases we have examined, it is said that if the parties intended a loan of money, the

usury statute was applicable, and it was left to the jury as a question of fact to decide if such a loan of money *was* intended.

Once respondent concedes that the transactions in question constituted loans of money, its argument becomes untenable. The cases it relies upon in support of this argument are all cases which proceed on the theory that *no loan of money was intended*; that the parties had some *bona fide* business relations requiring financial transactions, *not* intended as no loans of money.

Thus, in *Orris v. Curtis* (157 N. Y. 657), pages 18 and 19 of respondent's brief, the parties were *partners*, sharing profits according to the amount of capital invested; and it was held that the usury statute did not apply to dealings between *partners*, because there was really no loan intended, but an adjustment of equities.

In *Brown v. Robinson*, 224 N. Y. 301 (Respondent's Brief, p. 19), there was an actual purchase of a contingent interest of the plaintiff's *cestui que trust* in the estate of his mother. There was no agreement on the part of the *cestui que trust* to repay any of the advances made to him, and the purchaser risked the hazard of loss of the entire price paid, in case of the death of the principal. The decision, therefore, went off upon the doctrine anciently established in *Beddingfield v. Ashley*, Cro. Eliz. 741, that, to constitute usury, there must be an agreement to repay absolutely and in all events and the purchase price, to constitute a *loan*, must not be subject to defeat by any hazard.

In *Ryttenberg v. Schefer*, 131 F. R. 313, decided in the District Court, a commission house acted as *factor* for a business house.

Holt, J., said :

"Schefer, Schramm & Vogel guaranteed the consignments, and permitted Radon & Co. to have the benefit of the name and credit of their house under the arrangement made. The contract was a genuine business arrangement, of mutual advantage to both parties, and not a mere cloak to cover usury."

In *Title Guarantee & Surety Co. v. Klein*, 178 F. R. 689, C. C. A. Third Circuit, an obligation for the payment of money (*i. e.*, not the lender's own note, but United States Government 3% bonds), were sold, with an agreement to redeliver. The Court said :

"The United States bonds that were the subject of this loan * * * were subject to fluctuation and for that reason among others *were not to be regarded as a loan of money.*"

The theory on which that transaction was sustained is inapplicable to the case at bar; for there could be no "fluctuation" in the value of respondent's own note. * * * At maturity, it had to be paid in full, and respondent would then be in the same situation whether it "loaned" or delivered to a borrower, in the first instance, its note, its check or its cash.

In *Meeker v. Fiero*, 145 N. Y. 165, a loan had long since been made with a mortgage for security. The borrower desired the lender to surrender the security and take another security in place for it, and the Court held that this was

“simply a change of security for an existing debt and that S—— could lawfully demand compensation for assenting to the transaction.”

In the case at bar (as Clarke, *J.*, pointed out in *Hooley v. Talcott*), there were no dealings between the parties except an attempt to borrow and to lend money.

Nor was it any part of petitioner's case to show “corrupt” intent, if that expression be taken to mean immoral or wrongful purpose.

Bank of Salina v. Alvord, 31 N. Y. 473;

Fiedler v. Darwin, 50 N. Y., at page 443,

where the Court stated:

“The intent which enters into and is essential to constitute usury is simply intent to take or reserve more than 7% (the statutory rate when that opinion was handed down) per annum for loan of money.”

POINT IV.

Respondent's argument that its "commission" represents actual services rendered overlooks the testimony to the contrary in the record.

At page 27 of respondent's brief, it seeks to parallel this case with *Righter v. Cowgell*, by suggesting certain alleged services for which the one quarter of a per cent. per month was actual compensation. In that case (quoted in our brief at p. 25), respondent "had considerable trouble" with the goods. The argument based on respondent's alleged actual services, in the present case, overlooks the testimony of its own witness Cosgrove (R., 129) :

"Q. And you did not do any additional work with respect to them, and you did not render any services with regard to taking care of the merchandise? A. No, I would not say that we did.

Q. That is what the warehouse was paid for. A. Exactly.

Q. With regard to the care or custody of the merchandise, I mean. In this transaction, there is a statement of \$30.40 paid as commission for its responsibility and services as above in advance of credit? A. Yes.

Q. Would you say that was for the advance of credit? A. It was, in this particular instance.

Q. There were no other services in regard to taking care of the merchandise? A. There were not in any of Coccaro's cases."

As Justice Clarke aptly pointed out in *Hooley v. Talcott* (see our brief, p. 38), this commission was a fixed percentage of one quarter per cent, a month for the amount loaned, irrespective of renewals, and regardless of whether there were any appraisals.

Respondent, at page 25 of its brief, suggests that we are under a misapprehension in believing that their "warehouse" is "a new scheme of corporation", since it has been in business fifty years. On the contrary, as we pointed out in our original brief (p. 14), we consider respondent's plan for loaning money a mere vestigial remainder, all similar devices having long since been abandoned in New York.

At page 31, exception is taken to our statement at page 9 that S. B. Lewis & Co. "*bought*" any of respondent's notes.

The evidence is that in at least one instance S. B. Lewis & Co. drew their *own* check (R., 154), exchanged it for a cashier's check on their own bank (R., 154) and delivered it to respondent in exchange for its note (R., 155). Thus, S. B. Lewis & Co. not only made a broker's commission (R., 156), but also interest until the date it re-hypothecated the note (R., 156, fol. 199), and any profit if they sold it at a more favorable discount rate, for they did not inform respondent what bank they "*sold* the paper to" (R., 158). It seems to us that this record amply justifies our assertion at page 9 of our brief that "*Lewis bought the draft*".

POINT V.

Respondent's suggestion that any "independent" investigation of collateral was made by it in Philadelphia is without basis in the record. The admissions of its Secretary show that the "deal was closed" in New York, and the New York statute applies.

At page 31 of its brief, respondent likewise seeks to "correct" our statement (our brief, p. 28, items 9-12), that Cosgrove made his investigation in the trade in New York, and says "the evidence does not support this contention", without quoting or analyzing the "evidence" which they have in mind. We have printed all the evidence on this point in our brief at pages 33-35. Cosgrove clearly said (R., 76) that his inquiry was to be made by him "*that day*" (i. e., the day of the conversation), and that *upon his return* to Philadelphia the *next day*, the note would issue. He took the documents to Philadelphia and *in the meantime* had made his inquiry. The *next* thing that happened was that on the morning following, the note was issued (R., 77).

Respondent seeks to "correct" this clear statement of its own witness to mean that some of its other officers or employees made independent inquiry in Philadelphia. It quotes no evidence to sustain the suggestion, and there *is* none. It is fair to assume that none could be adduced, else Cosgrove or whoever else made such inquiry,

would have testified to it. This observation is especially apposite in view of the unnecessarily exhaustive and meticulous detail of the proofs presented by respondent. In view of this state of the record, we believe the Court will be justified in accepting the statement in our original brief that the deal was *closed* when Cosgrove left New York.

CONCLUSION.

Petitioners submit that none of the cases cited in respondents' brief is authority for the contentions upon which they rely, and that the argument outlined in petitioners' brief has not been met.

We therefore submit that the Circuit Court of Appeals was in error in reversing the verdict of the jury and that that verdict should be reinstated. In that way only can the error of the Circuit Court of Appeals in reversing the decision of the jury after its full and fair hearing of the facts on the merits, be corrected.

Respectfully submitted,

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No. 198

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IN THE
Supreme Court of the United States,
OCTOBER TERM—1926.

JOSEPH SEEMAN, *et al.*,
Petitioners,
—against—

PHILADELPHIA WAREHOUSE CO.,
Respondent.

BRIEF FOR PETITIONERS.

COHEN, COLE & WEISS,
Attorneys for Petitioners.

SAMUEL F. FRANK,
HARRY J. LEFFERT,
ARTHUR W. WEIL,
Of Counsel.

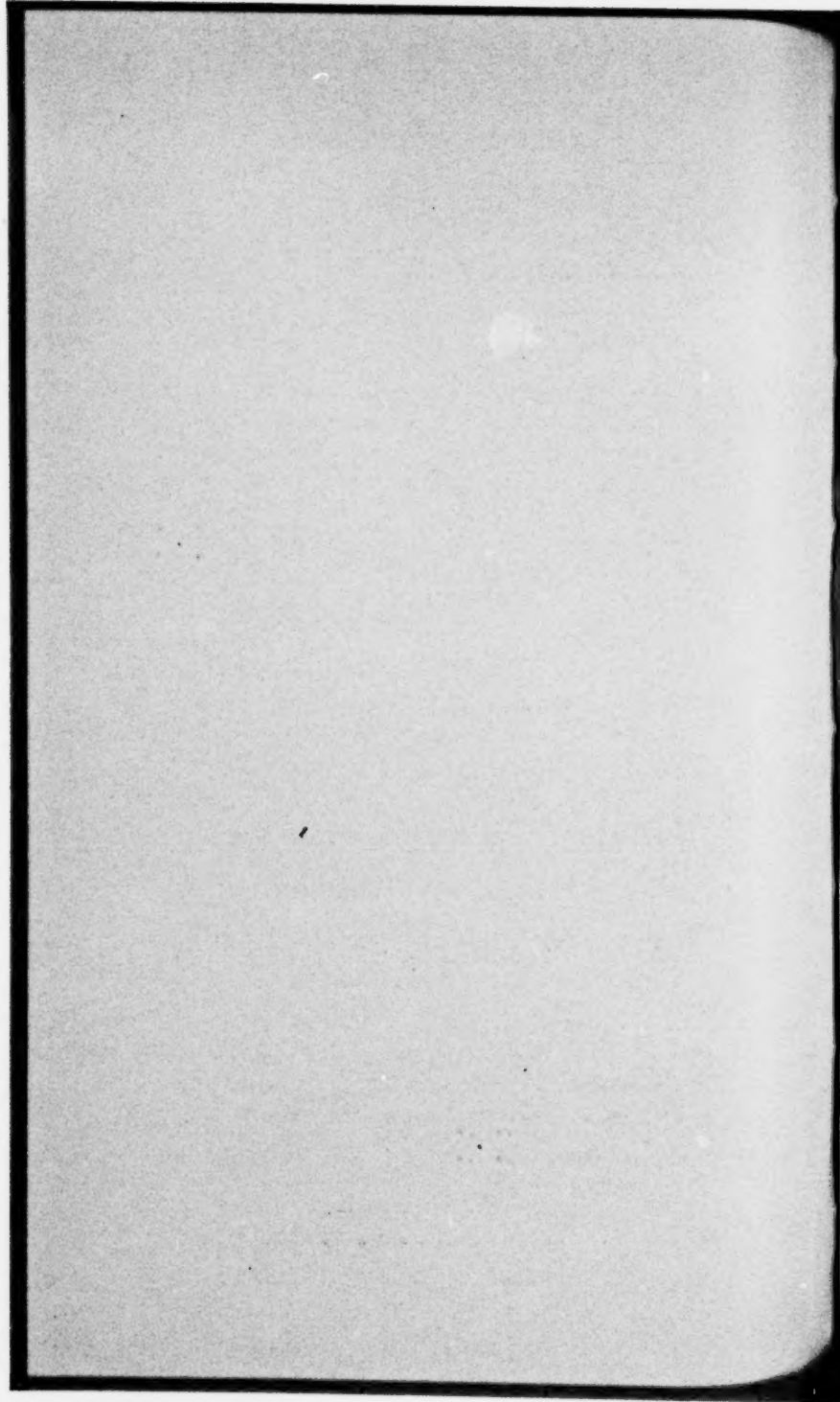


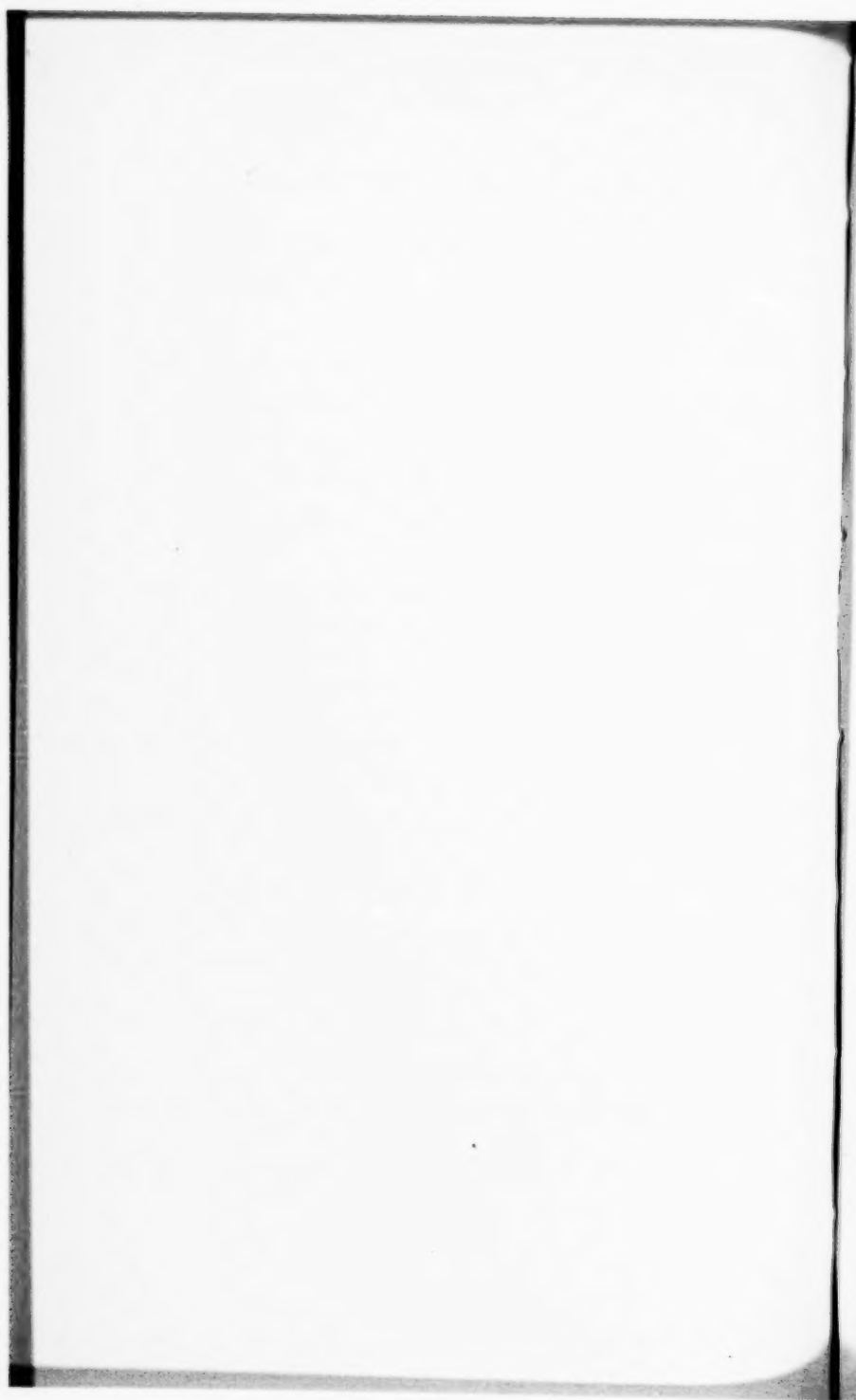
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IN THE
Supreme Court of the United States.

JOSEPH SEEMAN, *et al.*,

Petitioners,

—against—

PHILADELPHIA WAREHOUSE Co.,

Respondent.

BRIEF FOR PETITIONERS.

This cause comes up upon a writ of certiorari granted by this Court, directed to the Circuit Court of Appeals for the Second Circuit.

Respondent brought the action at law, claiming a money judgment of \$8,000 for alleged conversion of 1,000 cases of canned salmon (R. 4).

The complaint (R. 3) based respondent's title to the salmon upon a pledge thereof made by the firm of A. J. Coccaro & Co. to secure "advances of credit" made by it to said firm, and not repaid.

The answer (R. 4-7) admitted purchasing the salmon from said Coccaro & Co. but alleged that petitioners had bought and paid for it in good faith, without any notice of respondent's unrecorded alleged lien thereon (R. 6, fol. 11).

As a defense, petitioners also set forth (R. 5) that the transactions between respondent and Coccaro & Co.,

constituting the alleged "advances of credit", were usurious; that the pledge of the salmon given as security therefor was void—said defense being available to petitioners, as subsequent purchasers of the goods from the borrower, Coccaro, under the principle of

Lloyd v. Scott, 4 Peters 205;

Merchant's Exchange National Bank v. Commercial Warehouse Co., 49 N. Y. 635.

The action was commenced in the Southern District of New York on April 6, 1921; trial thereof was begun before Circuit Judge Julian W. Mack and a jury on November 7, 1923. A verdict in favor of the defendants (the petitioners here) was rendered on November 14, 1923, and a motion to set aside was denied by Judge Mack (R. 11).

The judgment and order entered thereon were reversed by the Circuit Court of Appeals (R. 398), with an opinion by Manton, J. (R. 391), reported in 7 Fed. (2nd Series) 999.

Petitioners seek to review such judgment of reversal by the instant writ of certiorari.

The Facts.

Petitioners, under the name of "Seeman Brothers", have been engaged in the wholesale grocery business in New York City since 1886 (R. 187).

On February 17, 1920, they saw an advertisement in the New York "Journal of Commerce", offering for sale 1000 cases of "Blue Boy" salmon (R. 188) which, it appears, was the same lot of salmon which respondent claims in this action. Petitioners applied to one Martin,

the broker who had inserted the advertisement, and, through him (R. 188), bought the salmon from the New York firm of A. J. Coccaro & Co. and paid for it in full, concededly without knowledge of the alleged rights of respondent, and in entire good faith (R. 188, fol. 236).

More than a year after this purchase and payment by petitioners, respondent for the first time (on March 11th, 1921, R. 19, Exhibit J), made claim upon petitioners for 999 of the said 1,000 cases of salmon or their value (R. 187, fol. 235).

Respondent claimed title to the salmon by virtue of a so-called "Pledge Contract" (Plaintiff's Exhibit 21, R. 284) of the goods in question executed to it by Coccaro & Co. when respondent made advances to him upon such merchandise. The nature of such loans is indicated in the following advertisement which respondent maintained in the same "Journal of Commerce" (Exhibit H, R. 364):

"TIME LOANS ON MDSE.

in any responsible warehouse
at $\frac{1}{4}\%$ per month over lowest rate
for best commercial paper
No rehypothecation of notes or mdse.
No deposit balance to be maintained.
Interest allowed on prepayments for
releases of mdse.

Philadelphia Warehouse Company
3rd & Chestnut Sts., Phila.
Capital \$1,000,000 Surplus \$1,000,000
Established 1873."

Respondent—though calling itself a "Warehouse Company"—never owned or operated *any* warehouse *any*

where (R. 108). Its business was the making of such "Time Loans on Merchandise", though it was not licensed under the banking laws of Pennsylvania or of New York.

Respondent's secretary, Cosgrove, came to New York from time to time and, in *New York*, made arrangements with Coccaro as the result of which the latter got money against the pledge of his merchandise in warehouse (R. 72-130). There were a series of these transactions—and renewals of each of them—but the origin of the business was admittedly as follows. Cosgrove, respondent's secretary, testified (R. 103, fol. 137) :

"Q. So then I am correct in stating that in each one of those transactions that are stated in this Bill of Particulars of *ours you came to New York City and made the arrangements with Coccaro, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods then the deal was closed so far as the arrangement between you and Coccaro was concerned?* A. So far as the agreement to do what we undertook to do was concerned."

This was amplified by McAndrew, an employee of Coccaro, who testified (R. 194) :

"A. I asked Mr. Cosgrove if he would be interested in making a loan on some foodstuffs that we had in a warehouse."

(R. 195) :

"A. He told me that it would cost me one-quarter, one-half, and one per cent. I asked him

did he mean a quarter of one per cent. per annum, or per month, so he told me per month, so I asked him why he did not tell me the exact figure. He said, 'Well, it is the method that we apply in our payments.' He said, 'We get one-quarter of one per cent. for our commissions.' He said, 'We pay one-half or thereabouts, or whatever the money costs us,' and he said, 'The one per cent. you pay to A. U. Surprenant & Company.' I asked him why I should pay A. U. Surprenant & Company, and he told me that was the only way he could do business with me, would be through A. U. Surprenant & Company."

(R. 196, fol. 245) :

"Q. At any rate, did Mr. Cosgrove on the second occasion you saw him, produce any printed papers? A. He had this form with him and I know there were two or three signatures required
* * *."

The printed form referred to is the so-called "pledge contract" (Exhibit 41A, R. 309, R. 196) ;

"A. I gave them to Mr. Coccaro and he signed them."

(R. 197) :

"Q. Was there anything said at that time or immediately prior to that time that those papers were signed, about the signature or about the contents? A. I looked over the papers.

Q. Tell us what you said, as nearly as you can remember the words. A. As near as I can remember it, I asked Mr. Cosgrove what was the idea of all those papers and he told me that this was

a form that was given to them by their attorneys and the reason for doing it was to comply with the law."

Thus, in addition to interest upon the advances or loans (which current interest in itself was in several instances in excess of 6% per annum, R. 170; also insert after R. 326, under column headed "Rate"), Coccaro was required to pay an additional 3% per year to respondent besides brokerage fees to Lewis of $\frac{1}{8}$ of one per cent. a month and commissions to Surprenant, thus bringing up the total rate paid by the borrower to from $21\frac{1}{4}\%$ to 23% a year, as follows:

Current interest rate	$5\frac{1}{2}$	to	$7\frac{1}{4}\%$	per annum
Respondent's commission (R. 113)	3	"	3	" " "
Lewis customary brokerage (R. 112)	$\frac{3}{4}$	"	1	" " "
Surprenant's commissions (R. 227)	12		12	" " "
	<hr/>		<hr/>	
	$21\frac{1}{4}$	"	$23\frac{1}{4}$	" " "

Even assuming that Surprenant's charge were not attributable to respondent, the borrower had to pay from $9\frac{1}{4}\%$ to $14\frac{1}{4}\%$ per annum.

Chief Justice Best declared to the House of Lords (3 Bing. 193) that the policy of all usury laws in modern times is to protect necessity against avarice, and to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and national wealth. It needs but little discussion to show that a violation of these principles brought Coccaro—the borrower in the case at bar—to his ultimate plight, and explains, though it cannot excuse,

his desperate shifts to save himself by selling the salmon in question to petitioners.

With this incidental observation as to cause and effect, we pass to an examination of respondent's plan for effecting its "Time Loan" to Coccoaro.

After making the agreement with the borrower at New York, respondent issued its own note to its own note-broker (R. 106) who discounted it and forthwith delivered a check therefor to respondent, and *respondent* transmitted the proceeds of such note to Coccoaro in New York. This note-broker—S. B. Lewis & Co., also of Philadelphia—was previously unknown to Coccoaro (R. 106), and respondent had Coccoaro sign a printed authorization designating Lewis whose name was printed therein as his representative for such purposes (R. 106, fol. 141; Exhibit 22, R. 287).

The "Pledge Contract", and the "Authorization" of Lewis, were printed in advance; all Coccoaro had to do was to sign on the dotted lines (R. 106, R. 108, fol. 163).

A list of the entire series of transactions between respondent and Coccoaro is contained in Exhibit 39 (R. 302, Insert).

The particular transaction involving the 1,000 cases of Blue Boy Salmon in question valued at \$8,400 (Exhibit 21, R. 284) covered a loan thereupon of \$5,900 on November 18, 1919, payable January 20, 1920.

The other transactions are relied upon in the complaint (R. 3) to establish an additional unpaid indebtedness from Coccoaro to the respondent. It is alleged that the "Blue Boy" salmon was pledged as security for the \$5,900 loan (R. 284), and also

"inter alia, as security for other advances made and to be made".

This allegation paraphrases Paragraph 3 of the Pledge Contract (R. 285), and is material, for the complaint alleges the salmon is worth \$8,000 (R. 4). In the absence of such an "*inter alia*" allegation, respondent could recover only so much of the salmon as would cover its \$5,900 loan.

Necessarily, on the other hand, usury in any of the other transactions thus linked, would prove fatal to respondent's recovery. So the trial Court charged, without exception (R. 275).

Respondent's precise *modus operandi* in this matter will be most readily seen by examining the original instruments in the transaction of November 18, 1919, involving the Blue Boy Salmon.

On that date, Coccaro, in New York, signed the "Pledge Contract" (Exhibit 21, R. 284), and the "Brokers Authorization" to S. B. Lewis (Exhibit 22, R. 287), endorsed (R. 290) the Bill of Lading for the Salmon (Exhibit 23, R. 288), and drew his check for \$30.48, covering respondent's 3% per annum on the \$5,900 (R. 76) for 63 days. He delivered these papers in New York to Cosgrove, who took them to Philadelphia next morning (R. 77).

The next morning (November 19, 1919) respondent drew its note (Exhibit 24, R. 291) for \$5,900 payable to its own order at the Chase National Bank in New York and delivered it to S. B. Lewis & Co. (Exhibit 24, R. 291). Lewis *immediately* (R. 154) obtained a cashier's check (Exhibit 27, R. 293) from the First National Bank of Philadelphia *payable to the order of respondent* for \$5,834.20 (*i. e.*, \$5,900, less discount and brokerage) and delivered it, together with its report (Exhibit 25, R. 292) to respondent. Although Lewis claims to have discounted respondent's note subsequently with the Rock-

land National Bank of Boston [see Endorsement on Exhibit 24, R. 291], this seems to have no bearing on the case, as Lewis bought the draft and gave respondent his check. It is especially significant that Lewis neither drew, delivered nor sent any of these papers or checks to the borrower.

Respondent, however, still on the same date, November 19, endorsed the cashier's check to its own order and returned it with a letter (Exhibit 26) to the First National Bank of Philadelphia, directing the latter to telegraph the amount to the credit of A. J. Coccaro & Co. in the Irving National Bank at New York (R. 293, fol. 365).

On January 20, 1920, the expiration date fixed on the original "pledge contract", Coccaro filled out another printed form of respondent's (Exhibit 30, R. 295) paid its charges by his check for \$101.49, and obtained a renewal of the loan to March 23, 1920 (R. 295).

The Issues in the Case.

Respondent contended that its proceedings thus outlined constituted a "loan of credit" rather than a loan of money, and did not, therefore, come within the purview of any usury law; though the rates paid by Coccaro far exceeded the legal rate of 6% per annum.

Petitioners claimed that this was clearly a usurious loan, only transparently disguised by respondent's device of first issuing its *note* instead of its *check*; that, therefore, the transaction was void as to Coccaro, and, consequently, as to petitioners, whose title to the salmon was derived from him.

In other words, this Court will have to decide whether the respondent has astutely devised a method of lending money which will protect it from the usury statutes, when, for all practical purposes, it really *is* conduct-

ing a systematic business of lending money, without the supervision of any banking law.

The jury, clearly presented with the question by the trial Court, decided upon the facts that respondent's system, with its printed papers and regular arranged methods, was simply a device to cover loans of money. The Circuit Court of Appeals has reversed this finding of fact and has held, in effect, that respondent has evolved an unbeatable plan to avoid the usury statute, irrespective of the place where, or the circumstances under which, it is used.

The opinion of the Circuit Court of Appeals concludes by saying (MANTON, J., writing) :

"The only defense urged below is that of usury. We hold that this transaction was not usurious and judgment should have been directed for the plaintiff-in-error."

Petitioners contends that this judgment of reversal is erroneous because :

1. The holding of the Circuit Court of Appeals that, as matter of fact, respondent did not violate the New York Usury Statute, because in effect it issued to the borrower or to its own bank, its *note* instead of its *check*, amounts to a judicial repeal of the New York Usury Statute; and in view of the finding of the jury, sustained by the trial Judge, that the transaction was *in fact* a usurious loan, exceeds its jurisdiction as limited by Section 879 of the Judicial Code.

2. It interprets the usury statute of the State of New York in a manner directly contrary to the interpretation thereof by the courts of that

state notwithstanding the rule laid down by this Court as to the controlling effect of State usury statutes and decisions, in *Missouri, etc., Trust Co. v. Krummweig*, 172 U. S. 351, and contrary to the decisions of this Court, notably *Andrews v. Pond*, 38 U. S. (13 Peters) 65; and *Tilden v. Blair*, 21 Wall. 241.

POINT I.

The judgment of the Circuit Court of Appeals is erroneous, because

(a) The finding of the jury that respondent's systematic devices for alleged "loans of credit" merely disguised actual loans of money at a usurious rate, was made with respect to a question as to which the jury was the proper and exclusive trier of the facts; the reversal of such finding of fact exceeded the jurisdiction of the Circuit Court of Appeals, as limited by Section 879 of the Judicial Code.

(b) The evidence fully justified the jury's conclusion that respondent's device of issuing its note instead of its check amounted to a mere matter of form, and that the transaction between respondent and Coccaro was really a usurious loan.

(1)

The usury statute of the State of New York (General Business Law, Secs. 370, 371, 373 and 380—printed in full as Appendix A) makes void any instrument or

security given for the loan of money, goods or things in action at a rate in excess of six per cent. per annum.

Usury is thus forbidden by statute, with severe penalties for violation; but the business is notoriously a highly profitable one, and therefore, highly attractive. It is scarcely to be expected that the experienced and habitual money-lender will not attempt to ply his lucrative pursuit, under euphemistic titles, with every variety of form and disguise that experience, skill and ingenuity can suggest. The Courts have, therefore, uniformly held that, whatever the form of the transaction, its real nature is to be determined as a question of fact.

Lord Mansfield said, in *Floyer v. Edwards*, 1 Cowp. 112, 114:

"Where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute."

An unbroken series of decisions has held that whether or not the form of a given transaction represents such an attempted shift, is a question for the jury.

The decision of the Circuit Court of Appeals here under review, represents the first break in that series; for it cannot be denied that its judgment is, in the main, an affirmative finding on that very question disregarding the jury's conclusion.

The record makes it perfectly evident that respondent is a money-lending institution. The opinion of the Court of Appeals describes it as "a corporation doing a warehouse business" in Pennsylvania—an evident error, as the record shows it has no warehouse and never operated one anywhere (R. 108), nor is it licensed to do business under the banking laws of either New York or Pennsylvania. Whatever forms or methods it

has invented, cannot conceal the fact that it *was* doing what it advertised *to* do, *i. e.*, making "Time loans on merchandise" (Exhibit H, R. 364, fol. 447).

The "Loan of Credit" Theory.

The respondent seeks to justify its exactions by asserting that it is not lending money, but is "lending its credit".

In the course of the development of case law, that expression has been much used, much criticised, and frequently repeated with a looseness or absence of definition, which has caused much confusion of ideas and words. The explanation of this seems to be the disinclination of courts, at one time, to enforce the usury laws, particularly in isolated transactions between individuals, or in cases where there were practical difficulties for bankers in exchanges of money and credit between town and city. In 1842, Judge Cowen, of New York, took occasion to note (4 Hill (N. Y.) 254) :

"I am aware the modern notion on the subject of usury is so latitudinarian, that judges are put on the defensive for holding almost anything to be within the statute."

Since that time, conditions have changed very much. Isolated lending transactions (as to which Judges felt it was not fair play to return a favor, even if paid for, by pleading usury) are the exception rather than the rule. Various devices, formerly used, have disappeared, such as the plan of giving a borrower "post-notes" instead of money, disapproved by this Court in

Gaither v. Farmers Bank, 1 Peters 37,

whereby the borrower had to carry the lender's expense for selling the latter's depreciated notes. So, also, the New York reports show no further history of the alleged "Commercial Warehouses" which did not warehouse but which charged "commissions" for pretended services, which were held usurious, in cases such as

Caldwell v. The Commercial Warehouse Company of New York, 1 Hun 718;

Merchants Bank v. Same, 49 N. Y. 634.

One cannot "lend" an impalpable, intangible thing, such as its "credit", which cannot be repaid. The expression is a misnomer. Nor is it logical for respondent to speak of "selling" its *credit*. This confuses the means and the end. What it must really claim is that it was lending to Coccaro its own *notes*, which it issued especially as a means of raising money, which money the borrower was to repay to it.

There is a good reason, however, why respondent does not state the *actuality*, but prefers the use of a meaningless *phrase*. That is because the usury law of the State of New York likewise forbids loans of *things in action* where more than 6% is charged. Notes are "*things in action*". The notes being discounted immediately—on respondent's own theory, the substance and effect of lending the *notes* was to lend the *money*.

In *Dunham v. Dey*, 13 Johns. 40, Spencer, *J.*, asked:

"What is the difference between a man's lending his notes to raise money upon, taking more than legal interest, and lending his money? I confess I perceive no other difference than this: that the borrower of the notes must probably pay more usury, to get them converted into cash. But the transaction is substantially a lending of money,

and I agree with defendant's counsel, that if this device be tolerated, the statute is judicially repealed."

In affirming the judgment in that case, Chancellor Kent wrote that he was entirely of the same opinion.

Dunham v. Gould, 16 Johns. 367.

At best, it is difficult to draw a distinction (if there is any) between the legal or logical effect of respondent's carrying out its arrangement with the borrower—Coccaro—by sending him cash or its own *check*, drawn upon its own bank (which would undoubtedly be a loan) or providing the funds for the same purpose by discounting (or having its broker discount) its own note so that the proceeds reached the borrower (which, it contends, is a "loan of credit"). IN THE PARTICULAR TRANSACTION OUTLINED IN THE FOREGOING STATEMENT OF FACTS, RESPONDENT ACTUALLY RECEIVED FROM THE FIRST NATIONAL BANK OF PHILADELPHIA A CASHIER'S CHECK OF THAT BANK (Exhibit 27, R. 293) TO RESPONDENT'S OWN ORDER, ENDORSED THE SAME BACK TO IT, AND BY LETTER OF THE SAME DAY, DIRECTED THE SAME BANK TO FORWARD THE IDENTICAL AMOUNT REPRESENTED THEREBY, TO COCCARO AT NEW YORK (Exhibit 26, R. 293).

THERE IS NO PROOF THAT RESPONDENT COULD NOT JUST AS WELL HAVE SIGNED ITS CHECK DRAWN DIRECTLY TO COCCARO'S ORDER, OR COULD NOT (IF IT HAD NO FUNDS ON DEPOSIT) HAVE RAISED SUCH FUNDS BY DISCOUNTING ITS OWN NOTE WITH ITS OWN BANK, AND THEN DRAWN ITS CHECK UPON THE FUND SO CREATED. THE INSISTENCE OF RESPONDENT THROUGH THE CASE UPON ITS "HIGH CREDIT" AND FINANCIAL STANDING, SHOWS THAT IT COULD READILY HAVE DONE SO. In this case Coccaro issued no notes. Respondent neither endorsed nor guaranteed any notes

for him, but got money to him by discount of its own notes. Either way, he got the same thing; either way there was a loan. Thus, the asserted distinction between "lending its credit" and lending money to Cocco, reaches the verge of disappearance.

The fact is, respondent never even gave its notes to the borrower Cocco; but on one occasion direct to the Centennial Bank (R. 110, fol. 145) and in all other cases to S. B. Lewis & Company, note brokers named by respondent itself. These brokers handled transactions for it amounting to millions of dollars a year (R. 163); and respondent used printed forms as part of a regular routine, purporting to have the borrower appoint S. B. Lewis & Co. as agents of the borrower to discount respondent's note (R. 287, Exhibit 22). The speed and the stereotyped form of the transactions between respondent and Lewis (R. 164-167) show that, in effect, Lewis was merely an agency of respondent by which it either raised money to lend to its customers or sought to have it appear that it so procured the funds which it lent. So transparent and creaking a device did not fool the business men on the jury; but its significance evidently escaped the attention of the Court below.

If it be claimed that there was a sale of credit or of the notes, to the borrower, we may point out here that this neither squares with the advertised business of the respondent (p. 3 of this Brief) nor with the testimony. The borrower did not want notes, he wanted money. According to the insistence of respondent upon its A1, high credit, the borrower was led to believe that respondent's note was, in effect, money. The whole stage-dressing and phrase-making here are due to the actualities of the situation. A borrower wants money. A lender wishes to

lend, but insists upon a form or shift, worked out on a systematic basis, to distinguish tweedle-dum from tweedle-dee—a smoke-screen to hide what is really being done.

In the case at bar, no matter how respondent sought to conceal it, the sole aim in view was for the borrower, Coccaro, to get a loan of money on his merchandise. Cosgrove testified repeatedly that the former said so (R. 129). The machinery by which respondent obtained the money to make that loan (whether by issuing its note and discounting it itself or by having it sold by a broker or by drawing its check) was of no interest to the borrower, but simply the concern of respondent as to where and how it could get the money in accordance with its agreement to make "Time Loans on Merchandise".

IN CONCLUDING OUR DISCUSSION OF RESPONDENT'S "LOAN OF CREDIT THEORY", WE WISH TO EMPHASIZE THAT, AFTER ALL, IT IS A MERE THEORY; WHETHER THERE WAS ANY SUCH LOAN OF CREDIT IN THE CASE AT BAR, OR WHETHER IT WAS, IN FACT, A MERE USURIOUS LOAN OF MONEY MASQUERADING UNDER A CONVENIENT NAME, WAS FOR THE JURY TO DECIDE. WE CONTEND THAT THE JURY HAS DECIDED IT, AND THAT THE CIRCUIT COURT OF APPEALS WAS CONCLUDED BY THAT FINDING.

The authorities in point until the opinion below all hold that—if the "loan of credit" theory can be sustained, at all—it can only be sustained when the jury is convinced that, in fact, the transaction was not intended as a loan of money or its equivalent.

The situation has been thus explained in

29 American and English Encyclopedia of
Law 472:

"But if the transaction is in fact a loan or forbearance, the lender cannot, by giving to it

the form of a sale of credit, prevent it from falling within the prohibition of the usury statutes; and it has been said *that transactions in the form of a sale of credit are to be viewed with great jealousy, as they are extremely liable to be perverted to usurious purposes.* After a person has accepted a bill or indorsed a note for another, his subsequent payment of such bill or note is a loan or advance, and he cannot, in addition to the maximum rate of interest on the money so loaned or advanced, charge a compensation for such loan or advance without rendering the transaction usurious,"

which cites, among other cases,

Beckwith v. The Windsor Manufacturing Co.,
14 Conn. 605,

where the Court says:

"The question whether the transaction was fair, and *bona fide*, or a cover for usury was submitted to the jury, and they have found in favor of the validity of the transaction, judgment was rendered accordingly—page 606.

Should it be said that great danger may be apprehended from the perversion of such contracts to usurious purposes, the answer is, that whenever they are so perverted, they will be void. The intent of the parties in making the contract must govern; and that is a question of fact, to be determined by that tribunal whose business it is to pass upon such matter; and if an usurious intent is found, it will vitiate the contract."

In *Carstairs v. Stein*, 4 Maule & S. 192 (105 Eng. Reprint, 805), Lord Ellenborough aptly remarked:

"Commission cannot be added to the amount

of legal interest for the purpose of inducing a loan of money to be made and of recompensing it afterward, when made. All commission, where a loan of money exists, must be ascribed to and considered as an excess beyond legal interest, unless as far as it is ascribable to trouble and expense, *bona fide* incurred, in the course of the business transacted by the persons to whom such commission is paid * * *.

These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a colour for usury upon loans which were stipulated not to be required but were in fact required, and made from the beginning to the end of this business.

But the question, i. e., whether colour or not, was a question for the consideration of the jury * * *. The jury having drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw, and they having done so, we do not feel ourselves, as a Court of Law, but acting according to the rules by which Courts of Law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

Indeed, the principle asserted in the concluding part of this quotation, seems to be now fortified by express statutory enactment.

Section 879 of the Judicial Code—Title 28 of the Code of the Laws of the United States (formerly Section 1011 of the Revised Statutes)—reads:

"Reversals on Error Limited. There shall be no reversal in the Supreme Court or in a Circuit Court of Appeals upon a writ of error, for error in ruling any plea in abatement, other than a

plea of jurisdiction of the court, or for any error in fact."

(2)

We submit that the finding of the jury was based upon the evidence in the record, as interpreted by the Courts of the State of New York.

In *Missouri, etc., Trust Co. v. Krummweig*, 172 U. S. 351, this Court said:

"When a State thinks that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the Courts, as in this case, such a view of public policy in respect to contracts made within the state and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law; and the local law, consisting of the applicable statutes, as construed by the Supreme Court of the State, furnishes the rule of decision."

We submit that the Circuit Court of Appeals has not applied this principle to the case under review.

The contract was sought to be enforced in the State of New York; we show that it was made there; and we contend that the New York statutes, and the decisions of its Courts thereunder, were to be applied to the facts in this record.

We have noted that the rate paid by the borrower was far in excess of six per cent. The New York courts have decided that, where the lender imposes as a condition of the loan that the borrower pay commissions to a third person selected by the lender, the amount

thereof is to be considered in calculating the real rate of interest paid.

Kaufman v. Schwartz, 183 App. Div. 510-2.

"If it were clearly shown that the broker was employed by the defendant, and payment of a commission to him was made a condition of the loan, or that the payment of a fee to his attorney was required by the lender, we are of opinion the statute would have been violated."

The expression is merely a re-statement of the rule expressed by this Court.

Bank of U. S. v. Owens, 2 Peters 536-7;
Fowler v. Equitable Trust Co., 141 U. S. 385
 at page 405.

The record shows an extremely close relationship between respondent and Surprenant. Respondent had no office of its own in New York, and its secretary, Cosgrove, frequently used Surprenant's office in that City (R. 104-105). Though Cosgrove at first denied any direct financial dealings with Surprenant (R. 124, fol. 161) the mere casual inspection of respondent's books possible in the Court room during the course of the trial, disclosed several instances where Surprenant had brought other customers to respondent and had received a percentage from it on such business (R. 127). The rule of the New York case cited seems to be a necessary one, otherwise excessive interest rates could readily be cloaked as "commissions" to inside brokers.

But even without counting the money respondent required Coccoaro to pay to Surprenant, the exactions of respondent exceeded the legal rate of six per cent.

In *Hooley v. Talcott*, 129 App. Div. 233, the New York Appellate Division said:

"In all these transactions Talcott was acting as a money lender solely * * * There were no dealings between Talcott and Scherr pursuant to which any moneys became due from Scherr to Talcott other than these loans made pursuant to the general arrangement between Bush, Scherr's agent, and Talcott. The net result of these transactions was that Talcott received amounts aggregating something over 9% to something over 12% per annum, the interest and commissions in all cases being paid in advance * * * *It appears that the alleged commissions were a fixed percentage of one-quarter or one-half per cent. a month for the amount loaned either deducted from the amount loaned or paid in advance, and regardless of whether there were any appraisals or substitution.*"

This New York case, not referred to in the opinion below—although stressed in our brief and relied on by the trial Judge (R. 263) is directly applicable to the facts in this record; for here also, as in *Hooley v. Talcott*, there were no other dealings between the parties pursuant to which any moneys became due from Coccoaro to respondent, except the arrangement for the loans; and here, also, the "fixed commission" of 3% was payable regardless of, and not as compensation for, any actual care of collateral or other services, not rendered, nor ever intended to be.

Indeed, we conceive it to be a rule often laid down by this Court that the *form* of a transaction or the printed devices used as a cover therefor, cannot prevail to hide the real dealings between the parties.

This Court in *Andrews v. Pond*, 13 Peters 65, at page 76, said:

"But although the transaction, as exhibited in the accounts, appears on the face of it to have been free from the taint of usury, yet, if the ten per cent., charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usurious agreements; and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself. But whether this item was intended as a cover for usury or not, is a question exclusively for the jury."

Without repeating the testimony at length we may recall the attention of the Court to respondent's advertisement, offering "Time Loans on Merchandise" which is the beginning of the transaction, to the admissions of plaintiff's own secretary, Cosgrove, who came to New York to interview the borrower, Coccaro (R. 129, R. 76, R. 130, R. 102, R. 103, R. 104, R. 108, R. 109); and to the testimony of Coccaro's employee, McAndrew, corroborated by the records of the business and from Cosgrove's admissions, with the necessary inferences therefrom (R. 194, 195, 196, 197).

We submit that this testimony, beginning with Cosgrove's admission (R. 129):

"Q. When you spoke to Coccaro he wanted to borrow money, did he not? A. As far as I can recall, yes.

Q. And he applied to you for a loan of money, did he not? A. He did."

shows that Coccaro got from respondent what he wanted, a loan of money, despite the fact that Cosgrove recited to the borrower a "set form of words" which respondent employed in all such transactions (R. 130) by using papers prepared by respondent's attorney to comply with the law (R. 197); and that there was a distinct agreement (R. 195) for the lending and borrowing of money at rates in excess of those allowed by the usury statutes of the State of New York.

None of the authorities cited by the Circuit Court of Appeals really holds to the contrary.

The case of

Righter & Cowgill v. Philadelphia Warehouse Co.,

is the one upon which respondent rests its patent to ignore the usury law, and it is apparently given such an effect by the Court below.

In that case (*Righter & Cowgill v. Philadelphia Warehouse Co.*, 99 Penna. State, 289) the Pennsylvania Court held *on the record there before it* that the 3% charged by respondent represented actual services performed in the care of collateral which services were testified to by witnesses (see Opinion, 99 Pa. State, top of 294), and that there was no evidence at all of any other agreement than the papers offered by the respondent. There was no testimony as to the negotiations between the parties or as to the actual agreement they had reached.

In that case, the Pennsylvania Court said (99 Pa. State at p. 294):

"As appears from the testimony of John Neill, one of defendant's witnesses, there was consider-

able trouble connected with the care and custody of the collateral * * *. There was not a scintilla of evidence that the \$30 was paid for any other purpose than that expressed in the agreement, and *in the absence of proof* neither court nor jury had a right to presume it was intended for anything else." (Italics ours.)

The record in the instant case, however, showed that no expenses were incurred by respondent for the care of collateral, which was in a public warehouse and required no care by respondent (R. 128, 129), and that the 3% "commission", not to speak of Surprenant's 12% (R. 195), was really for additional compensation over and above 6% for lending out money, as it was held to be by the New York Appellate Division in *Hooley v. Talcott*.

Indeed—contrary to the situation in the *Righter & Cowgill* case—the testimony in the case now before this Court is that respondent delivered the bill of lading for the 1,000 cans of salmon to the warehouse in which it was to be stored and that Coccoaro paid to such warehouse for all expenses of handling, care, insurance, etc. (R. 294, Exhibit 29; R. 127, fol. 165).

We submit, therefore, that the situation in the case at bar is not governed by the *ratio decidendi* of the *Righter & Cowgill* case, but is on all fours with *Hooley v. Talcott*.

Petitioners, it is true, were not parties to the transaction between the Philadelphia warehouse, the respondent, and Coccoaro, in connection with which the usury occurred. But petitioners are innocent purchasers of the merchandise claimed by respondent, and as such are entitled to question the title of respondent thereto.

Lloyd v. Scott, 4 Peters 205;

Matthews v. Coe, 56 Barb. 430, at p. 441;

Merchants Exchange Bank v. New York, etc.,
49 N. Y. 643.

Inasmuch as respondent's title to the merchandise rested upon a transaction void for usury, its title failed, and it could not recover for conversion as against petitioners, *bona fide* purchasers of the goods in question.

POINT II.

The trial Court properly held that the contract was governed by the law of the State of New York where the agreement between respondent and the borrower, Cocco, was negotiated and definitely concluded.

Although the Circuit Court of Appeals founded its opinion squarely on the fact that the "transaction was not usurious" (R. 398), it suggested incidentally that it was governed by the Pennsylvania statute (which forfeits only the usurious interest upon a loan) and not by the New York statute, which prohibits recovery of the principal of the loan, as well.

Judge Manton based this conclusion upon

1. The fact that the printed form of "Pledge Contract" prepared by respondent (R. 396), required the borrower to repay the money to it in Philadelphia (R. 397), and

2. The argument that the contract for the loan or "loan of credit" was not complete until respondent delivered its notes to the note-broker Lewis in Philadelphia (R. 397, fol. 494).

We urge that the Circuit Court of Appeals erred on both these points, because:

- A. The undisputed evidence showed that in New

York there had been a complete meeting of the minds of respondent by Cosgrove, its secretary, and Coccaro, upon every essential element of the agreement between them.

B. The provision of the pledge contract that the money was to be repaid by Coccaro to respondent in Philadelphia, did not make that city the "place of performance", but was a mere incidental and immaterial circumstance, as is best shown by the fact that Coccaro actually repaid certain of the moneys to respondent at its bank in New York (R. 118, 119-120, 132, 140).

A.

The following summary shows what was done in New York:

1. Respondent advertised in the New York Journal of Commerce offering merchants in New York "time loans on merchandise" (Exhibit H, R. 364);
2. Respondent was doing business of that character in New York with merchants other than Coccaro (fol. 140, R. 105, 121);
3. Cosgrove, respondent's secretary, usually came to New York to transact such business for it (R. 106);
4. Cosgrove, was *authorized to*, and did, arrange for and *complete* transactions with respondent's customers in New York (R. 105);
5. Cosgrove met Coccaro (or McAndrews, his confidential man) in New York for the purpose of discussing arrangements by which Coccaro could get money (R. 102);

6. Cosgrove admitted that in New York Coccaro squarely asked him for a loan of money (R. 129-130) for which he was willing to give merchandise in the warehouse in New York as collateral (R. 130);

7. Cosgrove in New York stated to Coccaro the terms of the transaction, the rate at which plaintiff would advance the money, to wit: $\frac{1}{4}$, $\frac{1}{2}$ and 1% per month and that it would not make the loans except through Surprenant and upon payment of a "commission" to the latter (McAndrew, R. 195, 196);

8. It was in New York that respondent's printed forms of "pledge contract" and request to the note-brokers to sell the notes, were signed by Coccaro (R. 108) and delivered to Cosgrove (R. 104 and 112), though purporting to be dated at Philadelphia;

9. That, at the same time, a bill of lading for the merchandise was delivered as collateral to Cosgrove in New York (R. 260, 261);

10. That a check for $\frac{1}{4}$ of 1% plus the stamp tax were then delivered to Cosgrove in New York (R. 109);

11. That it was then arranged in New York that respondent would advance moneys to Coccaro provided an investigation showed that Coccaro's representation as to the value of the security was substantiated (R. 76);

12. That such investigation as to the valuation of the merchandise was made by Cosgrove himself in New York (R. 103), before he returned to Philadelphia (R. 77);

13. That the net proceeds obtained on various of respondent's notes were transmitted by respondent's own directions to the Irving National Bank in New York with instructions to deposit the same to the account of Cocco, pursuant to an agreement to that effect (R. 109);

14. That respondent maintained an account in the Chase National Bank in New York (R. 118) and that payments by Cocco on account of respondent's advances were made by depositing the same in its said account in that bank in New York (R. 118, 119-120, 132, 140).

A situation identical for all practical purposes was considered in *Hooley v. Talcott* (129 App. Div. 233).

In that case, Talcott made arrangements in New York with Bush, the agent of a Philadelphia merchant named Scherr. Scherr was to obtain moneys from Talcott, and to pay him therefor 6% interest and a commission of from one-quarter to one-half per cent. per month (See Opinion in that case, at p. 234). The method of making these loans was in every instance substantially the same. Scherr signed and endorsed blank notes and sent them to Bush in New York. Bush filled them in, *dated them at Philadelphia, payable by Scherr at a bank in Philadelphia*, and then delivered them to Talcott. Talcott thereupon gave his check to Scherr, either for the full amount of the loan (or for the amount of the loan less interest) and commissions. As security for these loans, silk belonging to Scherr stored in a warehouse in New York, was turned over to Talcott as collateral security.

The Appellate Division, summarizing the facts, said:

"The application for the loan was made by the borrower's agent to the defendant in the City of New York; the agreement entered into upon such request was made in the City of New York; the notes, though made payable, for the convenience of the borrower, at a bank in Philadelphia, were delivered to the defendant by the borrower's agent in the City of New York; the interest and the so-called commission was paid to the defendant in the City of New York; the money loaned was in possession of the defendant in the City of New York, and although the checks representing the same were sent to the borrower in Philadelphia, those checks were paid by the money of the defendant in the City of New York, and the goods—the collateral security for the repayment of such loans, were actually stored in the City of New York. *It seems to me that upon the whole transaction there is no doubt that the agreement at bar was a New York contract. The contract was for the loan of money upon the security of warehoused merchandise. The minds of the parties upon that contract met in the City of New York, where the agreement to loan upon such security was made.*"

Whatever may have been the rights of respondent in the instant case while operating in the State of Pennsylvania, under the statutes thereof, it deliberately elected to subject itself to the laws of New York when it assumed to do business in that State, to advertise for business in New York, to interview customers in New York, and to conclude agreements in New York with them. As to such transactions, it could stand on no different

footing than a New York concern doing a similar business there.

In the present case, nevertheless, the Circuit Court of Appeals said that (R. 397) :

"The loan did not have its inception in New York nor was it completed in New York. The transaction was carried out in Philadelphia. * * * The pledge agreement was drawn and dated in Philadelphia; the contract was a unilateral one and did not become binding in its terms until the plaintiff-in-error issued its note; that act was done in Philadelphia."

In this, we submit, the Circuit Court of Appeals erred.

What was there "unilateral" in the contract disclosed by the evidence just summarized? The parties' representatives had met; when they parted, they had reached an agreement; respondent had agreed to make the "deal", whatever name it be given, and Coccaro had agreed to accept it; the amount, the period of the loan's duration, the charges, the amount and kind of security—all had been agreed upon. The minds of the parties had met in New York on every essential element of an agreement, whatever label the transaction be given. There was nothing further to be done except to carry that agreement out.

The only sense in which that agreement could be deemed "unilateral", was that Coccaro had simultaneously entirely *performed his part of it, i. e.*, signed the papers proffered to him by Cosgrove, and delivered to Cosgrove his check for commissions and his endorsed Bill of Lading. What remained was *not* for respondent

to *accept* any agreement, but to perform, that is, to *carry out its part*, to get the money to Coccaro.

What was that "agreement" which Cosgrove admits he had made? (R. 103, fol. 137). To call the "pledge contract" (Exhibit II) the contract *per se* would be a misnomer. It is not signed by plaintiff, and provides for nothing to be done by it. If this form means anything at all, it is one element in a transaction to be construed with all other factors in finding what the real agreement was. This printed form was simply evidence, of no higher probative force than any other evidence. There is no agreement or contract in the four corners of the documents produced by respondent. Nothing was signed by it, or formally agreed to or accepted by it in writing at any time. It is hardly necessary to cite authority that where the contract is not contained within the four corners of an instrument, it *can* be spelled out partly from letters and documents and partly from testimony—each item furnishing part of the proof necessary to determine what the real contract and agreement of the parties was. Particularly is this the case when the only purpose of some of the "documents" is to conceal, mis-state or cover the real agreement made.

Gage v. J. F. Smyth Mercantile Co., 150 Fed. R. 429.

It seems clear that the agreement between the parties was not conclusively evidenced by the papers signed by Coccaro (not signed by respondent, no copies of which were left with Coccaro, and the recitals of which were palpably incorrect); when every essential element of a meeting of the minds of the parties existed when Cosgrove left New York City. The real arrangement as found by the jury—and the one which it decided was usurious—

was that which was made at the meeting between McAndrews and Cosgrove in November, 1919, referring to the entire series of loans here in question, and this real agreement coincides substantially, even upon Cosgrove's own statement, with what he claims took place in his subsequent interview with Coccoaro (if there ever was any such thing). At that interview (or interviews) all the details of the transaction were provided for; and the agreement for the usurious loan was consummated. Nothing was left undone, except to carry it out.

St. Johns v. Fowler, 183 App. Div.;

Anom Realty Co. v. Delancy Garage, 190 App. Div. 745.

For the purpose of having the admissions on that point clearly before the Court, we reprint them, as follows:

R. 103:

"Q. So, then, I am correct in stating that in each one of those transactions that are included in this bill of particulars of yours, you came to New York City, and made the arrangement with Coccoaro, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods, then *the deal was closed so far as the arrangement between you and Coccoaro was concerned?* A. *So far as the agreement to do what we undertook to do was concerned.*"

R. 104:

"Q. These papers that you gave to Coccoaro were shown to Coccoaro, and you had him sign, and he signed in your presence in New York? A. That is correct."

R. 76:

"A. I said that if the salmon were found by us to be substantiated as to the value set on it by him, from inquiry made *by me* in the trade *that day*, I would, upon my return to Philadelphia the *next day*, see that the note called for was issued."

R. 102:

"Q. In other words, when you left Coccoaro's office that day *that was a deal that was closed?*

A. No, I beg your pardon; subject to a satisfactory appraisal and examination of the collateral."

R. 103:

And in reference to such appraisal and examination:

"Q. *You did that likewise, did you?* A. Yes, *I did.*"

We submit that this makes it perfectly clear that there was a final and binding agreement to loan money (or issue a "note", as respondent contends) between the parties in New York, made between Cosgrove, respondent's secretary, who was in full charge and authority in the matter, and Coccoaro (R. 103); the deal was closed. It was only subject to the same man's (Cosgrove) making an examination and a satisfactory appraisal of the collateral which he, Cosgrove, did in New York that day (R. 111) *before returning to Philadelphia.*

R. 77:

"Q. In the meantime, had you made your investigations, or did you then make your investigations with regard to the salmon and its value? A. I did.

Q. And what occurred, if anything, further in that transaction in Philadelphia or elsewhere? I mean what was the next occurrence in that transaction? A. On the morning following, namely, November 19th * * * (fol. 104) there was issued in the office of the Company in Philadelphia a promissory note for \$5,900."

B.

The fact that respondent went through the form of obtaining the money for Coccaro by issuing its note in Philadelphia, having it discounted by Lewis, there and then forwarding the proceeds to Coccaro at New York, does not make Philadelphia the "place of performance" of the contract. Nor does the fact that Coccaro nominally "agreed" to repay respondent at Philadelphia. Obtaining the money by respondent was not performance of the contract: payment to Coccaro was. The place of repayment to respondent and the place where it might obtain moneys were merely matters of convenience for respondent, and not essentials in the agreement made in New York, the purpose of which was to get funds to Coccaro there.

In *Tilden v. Blair*, 21 Wall. 241, a note was drawn in New York and payable in New York. The drawer sent it to Chicago, intending that it be delivered and negotiated there. This Court held that the law of the place of the contract governed; that the controlling circumstance was that defendant sent his note to Chicago to be there delivered and negotiated; that the place of payment (in New York) was not the place of performance.

By analogy, respondent having sent its representative to transact and conclude business in New York, must be deemed to have contemplated the effect of the laws of that State—either to comply therewith, or to attempt to devise a way to avoid them. In seeking the “intent of the parties” as to which law should govern their agreement—made at New York as we have shown—mere recitals in the papers prepared by respondent are of no avail.

In *Russell v. Southard*, 12 Howard 927 (53 U. S. 139), this Court said:

“In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform.

But it is not to be forgotten that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the Court to watch vigilantly those exercises of skill, lest they should be effectual to accomplish what equity forbids, and that in doubtful cases the Court leans to the conclusion that the reality was a mortgage and not a sale.

It is true that Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court

of equity does not consider a consent thus obtained, sufficient to fix the rights of the parties. 'Necessitous men', says the Lord Chancellor in *Vernon v. Bethell*, 2 Eden 113, 'are not, truly speaking, free men; but to answer a present emergency, will submit to any terms that the crafty may impose upon them'."

Indeed, the meeting of the minds of Cosgrove and Coccaro, on behalf of the parties who arranged the loan, having so clearly been made in New York, and the forms devised by respondent being so evidently an "exercise of skill" to avoid the effect of that circumstance, the situation becomes that commented on by this Court in *Andrews v. Pond*, 38 U. S. (13 Peters) 65, in the following language:

"The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of security taken upon a usurious agreement which neither will execute? *Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a bona fide agreement made in one place to be executed in another.* In the last mentioned cases the agreements were permitted by the *lex loci con-*

tractus; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there it is void anywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

In *Hooley v. Talcott*, *supra*, Justice Clark, writing for the Appellate Division, said (p. 240):

"The rule deducible from all these cases is that the whole transaction will be looked into to ascertain where the real contract, the meeting of the minds, simply evidenced by the instrument, took place. When that is ascertained neither the date of the instrument, where signed, or where payable, is controlling. In the cases cited the instruments though signed and made payable in New York, were held not to be New York contracts because the agreement which they evidenced took place elsewhere. The converse must be true. *As in the case at bar the agreement to loan money and to deposit goods as collateral security took place in New York the contract was a New York contract though the notes evidencing that transaction were signed and made payable in Pennsylvania.*"

This conclusion is sustained by other authorities, in the New York Court of Appeals, e. g.:

Wilson v. Lewiston Mill, 150 N. Y. 324;

Wayne County Savings Bank v. Lowe, 81 N. Y. at page 571.

The following quotation from the latter case illustrates our argument :

"The note in suit was actually written in Pennsylvania in the form in use in that State by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent., which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and *all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and defendant. All that was done by the plaintiff in New York was simply an execution of that agreement, and as is said in Dickinson v. Edwards (p. 580), in citing Tilden v. Blair, the designation of the place of payment of the note was an incidental circumstance for the convenience of the maker, and not an essential part of the contract, or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another state and there makes an engagement with a citizen of that state for a loan or forbearance of money, lawful by laws of that state, can render his obligation void by making it payable in another state according with whose laws the contract would be usurious.*"

If a party who goes into another state and makes an engagement there, cannot render his obligation void by making it payable elsewhere, it follows that he cannot prevent it from being void by merely making it payable in another state.

CONCLUSION.

The verdict of the jury represents the justice and merits of the case, and the judgment of the Circuit Court of Appeals setting it aside should be reversed.

Petitioners need not argue whether the penalties imposed by the usury statute are severe or the law be artificial. That is a question of economics for the legislatures. But the rule of law which permits a concededly *bona fide* purchaser of goods to be held liable for conversion a year after he has purchased, in the open market, merchandise publicly advertised in the usual newspapers, is just as artificial, and the incidence of the hardship upon such reputable merchants is even more severe, since they are not money-lenders seeking to escape from public policy as crystalized by statute.

The Statute still stands upon the books of the greatest commercial state in the Union, and is obeyed by the great financial interests of the nation.

The trial Court admonished the jury not to be swayed in either direction by sympathy (R. 264). That the jury heeded his admonition is evidenced by the long and careful consideration which they gave the case (R. 278). Whether Respondent's astute attorneys have devised a method of lending money which they think will protect it from the usury statute or not, no amount of explanation can gloss over the fact that it is lending money, and that the verdict is a common sense finding of what was really done.

We cannot resist the conclusion expressed in *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 149:

"It has been said and reiterated by the courts, from the time the schemes and contrivances of

lenders became the subject of judicial examination, that there is no contrivance whatever by which a man can cover usury (*Jeston v. Brooke*, 2 Cowp. 793), and that no subterfuge shall be permitted to conceal it from the law (*De Wolf v. Johnson*, 10 Wheat 385), *yet if this agreement can stand it will require no wit or subtilty to circumvent the statute.*"

For, as aptly remarked in *In re Kellogg*, 113 Fed. Rep. 120:

"The wisdom of the usury Statute is not to be questioned by a judicial tribunal. It is the duty of the Court to enforce the law and not to legislate. Where the proofs are clear and satisfactory, the court is bound to apply the remedy without giving consideration to the drastic and penal features of the statute applicable to the facts under consideration."

Since respondent seeks to compel innocent and reputable merchants to pay twice for the same merchandise, after waiting over a year before even intimating to them that such a claim existed, it cannot with good grace ask for any special consideration from the courts. Where the application of strict (and perhaps artificial) rules of law may cause loss to concededly innocent and disinterested petitioners or to a respondent which has deliberately assumed the risks of a traffic promising unusual returns, though involving a commensurate risk of conflict with statutory regulation, it seems to us that the verdict of a jury, based upon concessions of respondent's own witness, and sustained by a trial Judge of experience, should be as good a test as any, of what is just.

***We therefore submit that the judgment of the
Circuit Court of Appeals should be reversed.***

Respectfully submitted,

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APPENDIX A.

CONSOLIDATED LAWS OF THE STATE OF
NEW YORK (Laws 1909, ch. 25).

GENERAL BUSINESS LAW.

Section 370. Rate of Interest. The rate of interest upon the loan or forbearance of any money, goods or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time.

Section 371. Usury forbidden. No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.

Section 373. Usurious contracts void. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, se-

curity or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled.

Section 380. Brokerage on Loans. No person shall, directly or indirectly, take or receive more than fifty cents for a brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars, and in that proportion for a greater or less sum, except loans on real estate security; nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance, or for any counter bond, bill, note or other security concerning the same.

FILED
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WM. H. STANBRO
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1925.

No. [REDACTED] **198**

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L.
STIX, CARL SEEMAN and FREDERICK SEE-
MAN, co-partners, doing business under the firm name
and style of SEEMAN BROTHERS,

Petitioner,

against

PHILADELPHIA WAREHOUSE CO.,

Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

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ARTHUR WATSON,
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IN THE
Supreme Court of the United States

October Term—1925.

No. 680.

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX, CARL SEEMAN and FREDERICK SEEMAN, co-partners, doing business under the firm name and style of SEEMAN BROTHERS,

Petitioners,

against

PHILADELPHIA WAREHOUSE Co.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondent's claim is that the petitioners converted certain salmon pledged by A. J. Coccaro & Co., of New York City, with the respondent. The conversion was accomplished by the purchase and acquisition of the salmon by the petitioners from A. J. Coccaro & Co. The sale of the salmon by A. J. Coccaro & Co. was fraudulent, as was that of other merchandise similarly pledged with the

respondent, as will be shown by this brief. A. J. Coccaro & Co. and the two members of that firm later went into bankruptcy. The respondent's total loss in all its dealings with A. J. Coccaro & Co., covering six different transactions, exceed \$55,000 (fols. 397, 1135, 40).

The petitioners' defense was the claim of usury in the transactions between the respondent and A. J. Coccaro & Co.

The respondent is a corporation of the State of Pennsylvania, having its only office in the City of Philadelphia, Pennsylvania, where it has been carrying on its business since 1871 (fol. 279). Early in its history, respondent adopted a method of lending its high credit, built on its resources and standing under written agreements. Its contracts and methods, as was pointed out in the opinion below, have been sanctioned as far back as 1882 by the highest court in Pennsylvania (*Righter & Cowgill Co. v. Philadelphia Warehouse Co.*, 99 Penn. St., 289).

Respondent's Regular Course of Business.

As a correct understanding of the respondent's plan of doing business is necessary for the determination of this application, we ask the indulgence of the court for the rather lengthy statement which follows:

In ordinary parlance the respondent's business, for a number of years, was as follows: It lent its credit by delivering its own promissory note to a merchant, who pledged with the respondent merchandise to insure that at the maturity of the note the merchant would make provision for its payment. Thus the pledgor received a note which

could readily be turned into cash by its sale, through note brokers, to various banks throughout the country, who recognized, through 50 years of experience, the financial standing and worth of the respondent (fol. 281). In this fashion the respondent advanced its credit upon merchandise deposited with it as collateral to an agreed percentage of the market value of such merchandise, as determined by the respondent's inspection and by independent appraisal (fol. 284). The respondent's uniform charge and the actual amount it invariably received for the issuance of its promissory notes against pledge of merchandise in public warehouse, was at the rate of 3 per cent. per annum upon the face amount of its notes so issued (fol. 285). Beyond this charge the respondent neither received nor exacted additional remuneration, commission or benefit, directly or indirectly (fols. 285, 305, 348, 395).

The respondent would deliver its note to the person applying for the advance of credit to be disposed of as the applicant chose; or the respondent would, for the applicant's accommodation and on his written instruction, turn over the note to a note broker for sale by him as agent for the applicant. In that case, it would deliver to the applicant the identical check received from the broker (fols. 285, 341, 545, 563). Respondent preferred to have these notes handled through brokers accustomed to selling its notes because of their knowledge of the market for respondent's paper, through being in touch with barks and other buyers of commercial paper from Maine to California, who have been buying this paper for the past half century. But it did not insist that the notes be sold by the applicant only through those brokers recommended by the respondent (fol. 286). (See, for

example, two transactions between respondent and Coccaro & Co., where notes were sold to a bank, not one of its own banks of deposit, without the intervention of note brokers, and where respondent returned to Coccaro & Co. the customary broker's commission paid in advance by the applicant [Plaintiff's Exhibits 35, fols. 1124-25; 37, fols. 1129-30; 41-D.C., fols. 1192; 41-F.C., fols. 1210-11.].)

The statement contained in the brief of petitioners (bottom of pp. 3, 14) that the respondent required Coccaro to designate Lewis & Co. (the note brokers who sold the notes in question here) is wholly unsubstantiated by the evidence, and is untrue. Likewise, the statement in petitioners' brief (p. 7) that the respondent at times gave its notes to its own bank, is untrue and unsubstantiated in the record. The fact is otherwise.

Considering now the actual practice adopted in carrying out the plan outlined above, we come to examine the actual documents used in connection with these advances of credit, which so clearly distinguish the transaction from a loan of money. When an advance of credit was made the applicant uniformly signed a printed pledge agreement (Exhibit 21, fols. 1057-68).

At the same time, the applicant paid to the respondent its commission, in advance, at the rate of 3 per cent. per annum upon the face of the notes which it issued and the sum necessary to pay for the Internal Revenue stamps thereon. These notes were always issued by the respondent at its office in Philadelphia where the applicant, by the terms of his printed agreement, was required to make all of his payments (fols. 404, 1059).

If the applicant desired the respondent's promissory notes to be delivered to him direct, that was

done (fol. 286). If he wanted them sold by the note brokers, recommended by the respondent, he signed and delivered to the respondent an order to that effect.

It is to be observed that respondent's obligation to the applicant terminated upon the issuance and delivery of its notes—in Philadelphia. In each instance where the respondent, acting for the applicant turned over these notes for sale to a note broker, the money resulting from the sale was remitted by the broker in Philadelphia to the respondent, in Philadelphia, as the applicant's representative who sent to the applicant the identical check so received.

When the date of maturity of the note, originally issued by the respondent, arrived, the applicant was, under the terms of his contract, obliged to pay to the respondent a sum equivalent to the face value of the note itself (fol. 1059). If, however, on the due date the applicant was unable or unwilling to make this payment, his inability or unwillingness did not relieve the respondent from the necessity of paying its own promissory note previously sold in the open market. If the applicant performed his contract he paid a sum equivalent to the face amount of the note to the respondent, the respondent was then in funds to meet its own maturing obligation, and the transaction was closed. If, however, the applicant did not do this, the respondent, under the contract, could have recourse to the security. To avoid this latter contingency, a machinery was provided by which, for the convenience of the applicant, the respondent on the written application of the applicant (see Exhibit 30, fol. 1102), would issue a new note in like sum, which, in turn, would be sold in the open market to supply itself partially with funds to meet its maturing obligation. We have said to put itself in

funds partially, because, just as in the first instance the original note was sold in the open market at a discount from its face value, so must the second note be sold at whatever rate was then current on the discount market, which might or might not vary from the original discount. When this renewal note was sold, the net proceeds thereof, that is to say, the proceeds less the discount and broker's fees, were paid over to the respondent, and when applied in full to the redemption of its maturing obligation, would leave a balance still to be met. This small balance was supplied by the applicant who, at the time that he requested the further renewal, or, as the parties have termed it, an extension of the advance of credit, paid by his check to the respondent a sum equivalent to the discount, brokerage fees and the Internal Revenue stamps (fol. 347). With these moneys paid to it by the applicant, together with the net proceeds of the sale of the new note, the respondent was placed in possession of funds with which to meet its original obligation then maturing. The original transaction was thus closed, and a new transaction was thus substituted for it. He also paid in order to induce the respondent to make this further advance, a charge at the rate of 3% per annum on the respondent's new notes on the new transaction. It is to be observed that by this operation the respondent performed the same service in this so-called extension as it performed in the original transaction (fols. 344-605).

The respondent, each year, issued its notes in these transactions in an amount between \$2,000,000 and \$5,000,000 (fol. 927), a substantial part of which was sold by S. B. Lewis & Co., note brokers (fol. 626). S. B. Lewis & Co. is a Pennsylvania corporation, specializing in the sale of commercial

paper and has its office in Philadelphia. It has been in this business for many years (fol. 568). It is a corporation separate and distinct from the respondent and has no relations with the respondent and none of its officers or members are officers or members of the respondent (fol. 572). Neither one of the two concerns was interested directly or indirectly in the affairs of the other, or in the profits of the other, or otherwise. S. B. Lewis & Co. keeps the respondent informed of the current market rate at which the respondent's paper can be sold so that its officers and employees can inform applicants (fol. 649).

The facts with reference to the advance of credit of \$5,900 on November 18th, 1919, the one under which the salmon converted by the petitioners was pledged to the respondent.

In the instant case the procedure with Coccoaro & Co. followed in every particular respondent's regular methods, and the printed forms used were those regularly employed (fol. 527).

This action is brought to recover the sum of \$8,000 for the conversion of 999 cases of Blue Boy Canned Salmon, the title to which was in the respondent under a negotiable railroad bill of lading, endorsed to the respondent by A. J. Coccoaro & Co., a partnership of New York City, on November 18, 1919.

These cases were pledged on that day by Coccoaro & Co. to the respondent as security for an advance of credit in the sum of \$5,900 to be made by the respondent and by the terms of the pledge agreement to be held as security for other advances of credit prior and subsequent.

The respondent advanced its credit by issuing its promissory note in the sum of \$5,900, dated November 18, 1919, payable January 20, 1920. This note was sold in Philadelphia by S. B. Lewis & Co., as note brokers, on November 19, 1919, under the written order from A. J. Coccoaro & Co. (Plaintiff's Exhibit 23, fol. 1069). The net proceeds of the sale thereof, to wit, \$5,384.20, represented by a cashier's check to the order of the plaintiff, received by the respondent from S. B. Lewis & Co. and immediately thereafter endorsed and delivered, by the respondent to the order of the First National Bank of Philadelphia, was by that bank at once remitted to Coccoaro & Company in New York City at their request, by telegraphic transfer to their account in the Irving National Bank (Plaintiff's Exhibit 22, fols. 1069-70; Plaintiff's Exhibit 24, fols. 1087-89; Plaintiff's Exhibit 25, fol. 1090; Plaintiff's Exhibit 26, fols. 1093-4; Plaintiff's Exhibit 27, fol. 1095, and Plaintiff's Exhibit 28, fol. 1096).

The facts and the circumstances under which this note was issued by the respondent are as follows: The respondent receives many applications through brokers seeking accommodation for their customers (529). In that way the respondent met A. U. Surprenant & Company, then of No. 10 Broad Street, New York City, who brought to the respondent various applicants, among them Coccoaro & Company.

Surprenant & Company secured financial accommodations for Coccoaro & Co. from various persons besides the respondent (fols. 772-90; fols. 812-22; Plaintiff's Exhibits 50, 51 and 52, fols. 1309-11).

Nearly two years prior thereto, to wit, in January, 1918, A. U. Surprenant first brought Coccoaro & Co. to the respondent for an advance of credit from the plaintiff (fol. 283). Surprenant

introduced Anthony J. Coccaro to William P. Cosgrove, the secretary of the respondent, in the office of A. U. Surprenant & Company in New York City (fol. 283). At that interview, Cosgrove explained in detail the nature and methods of respondent's business (to Coccaro) and that the respondent would only advance its credit through the issuance of its promissory notes, which Coccaro & Co. might sell direct, or which might be sold for Coccaro & Company by note brokers (fols. 284-290). That interview resulted in the respondent making its first advance of credit to Coccaro & Co.

On October 22, 1919, Coccaro & Co. had entered into an agreement with A. U. Surprenant & Co. under which the latter, for a consideration, was to obtain financial accommodation for Coccaro & Co. to finance the purchase of merchandise (fols. 781-82; Exhibit F, 1319-34). The respondent knew nothing whatever about the arrangement between Coccaro & Co. and A. U. Surprenant & Co. (fols. 968-9; 861).

In connection with the advance of credit by the respondent's note of \$5,900, hereinbefore described, A. J. Coccaro & Co., on November 18, 1919, signed the usual pledge agreement pledging to the respondent 1,000 cases of Blue Boy Canned Salmon to secure the respondent for such advance, and other advances of credit already made or which might thereafter be made by the respondent. In token thereof Coccaro & Co. endorsed and delivered to the respondent the negotiable bill of lading for 1,000 cases of Blue Boy Canned Salmon (Plaintiff's Exhibit 21, fols. 1058-68; Plaintiff's Exhibit 23, fols. 1070-84).

The respondent at the request of Coccaro & Co. instructed the Yorke Warehouse & Storage Co., Inc., of New York City, to secure the cases of

salmon from the railroad, and store the same in one of its warehouses for the respondent. Thereafter, the respondent received from the warehouse company a non-negotiable warehouse receipt for the salmon (fol. 999; Plaintiff's Exhibits 43-45, fols. 1216-20; Plaintiff's Exhibit 47, fol. 1303; Plaintiff's Exhibit 2, fols. 1039-41; Plaintiff's Exhibit 19, fols. 1054a-56a).

Thereafter, and between February 25, 1920, and March 26, 1920, the petitioners and their assignees removed the said cases of salmon from the warehouses under an order issued to them by Coccaro & Co. on February 18, 1920 (Plaintiff's Exhibit 3, fols. 1042-1044; Plaintiff's Exhibit 1, fols. 1036-38; Plaintiff's Exhibit 48, fols. 1304-5; Plaintiff's Exhibit 19, fols. 1054b-56b; Plaintiff's Exhibits 4-18, fols. 1045-55; fols. 553-57; 667-94; 150-165).

This fraudulent appropriation of respondent's collateral was made possible through the fact (unknown to the respondent, fol. 494) that the Yorke Warehouse Co. was owned by Coccaro through stock ownership. Its employees were dummies for Coccaro, and, of course, followed his instructions (fols. 116, 174-225).

Two so-called extensions of credit were requested by Coccaro & Co. and granted by respondent with respect to the note of \$5,900. This procedure followed the regular methods hereinbefore outlined (Plaintiff's Exhibits 30 and 36; fols. 1102 and 1126).

Prior to the maturity of the last extension of credit, Coccaro & Co. went into bankruptcy on May 27, 1920 (fol. 377).

At the time of the bankruptcy of Coccaro & Co. the firm was indebted to the respondent on six advances of credit, one of these being the credit for

\$5,900 furnishing the basis of the controversy in this action (fols. 496, 1136-40).

After the bankruptcy, respondent proceeded to examine its collateral at the Yorke Warehouse, and discovered that this collateral, together with much other collateral, had been removed (fols. 381, 396-7). Investigation established that the petitioners and their assignees had removed the salmon in question.

The case was submitted to the jury entirely on the defense of usury, the respondent's motion to strike out that defense and for a directed verdict being overruled (fols. 954-973). The verdict of the jury was in favor of the petitioners and the judgment entered thereon has been reversed by the United States Circuit Court of Appeals, Second District, which decided that the evidence did not sustain such verdict, that upon the evidence submitted at the trial the trial court should have directed a verdict for the respondent because there was no evidence to sustain a finding that the respondent exacted usury from Coccoaro & Co. The Circuit Court of Appeals further decided that the submission of the case to the jury on the theory that it was governed by the laws of New York State was erroneous because the evidence showed that it was subject only to the law of Pennsylvania, under which a contract for the payment of more than 6 per cent. interest is not illegal.

POINT I.

The Circuit Court of Appeals correctly decided that the evidence clearly showed that the respondent did not exact any usurious payment from A. J. Coccoaro & Co. and that there was no evidence to sustain the verdict in favor of the petitioners.

In its prima facie case the respondent offered in evidence all the documents in its own possession and in the possession of the note brokers, S. B. Lewis & Co., including the pledge contract (Plaintiff's Exhibit 21, fols. 1059-68); Coccoaro & Co.'s order to deliver the note issued thereunder to S. B. Lewis & Co. (Plaintiff's Exhibit 22, fol. 1069); the note issued thereunder endorsed by the purchaser, National Rockland Bank of Boston, Mass. (Plaintiff's Exhibit 24, fols. 1087-89); S. B. Lewis & Co.'s report of its sale, a copy of which was sent at once by mail to Coccoaro & Co. (Plaintiff's Exhibit 25, fols. 1090, 1097); S. B. Lewis & Co.'s order on First National Bank of Philadelphia for check for net proceeds of note (Plaintiff's Exhibit 46-B-D, fol. 1058); S. B. Lewis & Co.'s bill to National Rockland Bank of Roxbury, Boston, Mass., the purchaser of the note, for the purchase price thereof (Plaintiff's Exhibit 46-G-C and D, fols. 1085-87); S. B. Lewis & Co.'s memorandum of the sale (Plaintiff's Exhibit 46-A-D, fol. 1225); check of First National Bank of Philadelphia for net proceeds of the note received from S. B. Lewis & Co., and letter accompanying the check sent to the First National Bank of Philadelphia for transfer of the funds to the Irving National Bank, New York City, by telegraph or

telephone, pursuant to Coccoaro & Co.'s request (Plaintiff's Exhibits 26 and 27, fols. 1093-5); and similarly the documents on the extensions and other transactions were offered in evidence by the respondent.

It was established without contradiction that the respondent did not receive from S. B. Lewis & Co. or from any of the banks that purchased the various notes, any part of the brokerage or discount charged by them (fols. 285, 305, 348, 395). In each case the total compensation received by the respondent, directly or indirectly, was its commission at the rate of three per cent. per annum.

Upon the *prima facie* case of the respondent, the court would necessarily have granted a judgment in the respondent's favor, because there was no evidence that would have supported the defense of usury.

Recognizing the fact, the petitioners offered the testimony of one McAndrews as their only witness in support of the defense of usury. It is true that he testified as set forth in the petitioners' petition and brief, but the quotations from his testimony present only small portions of his testimony, and when his entire testimony is read it will be found that by his own words he has destroyed the effect of the words quoted in the petitioners' petition and brief.

His whole testimony must be considered, and not simply disjointed portions of it. The fact that he was called by the petitioners for the purpose of proving their allegation of usury does not in itself show that the whole of his testimony furnished sufficient evidence to sustain a verdict in favor of the petitioners based on that defense.

In an unguarded moment, McAndrew testified (fols. 775-) "I cannot tell you personally that I ever negotiated a loan. I never negotiated a loan." The claim is made by the petitioners that McAndrew was Coccoaro's confidential man and that he negotiated the series of advances mentioned in the respondent's bill of particulars. Yet "he never negotiated a loan." And he testified that though he went to Surprenant's office on numerous occasions, he was never introduced to Surprenant by Coccoaro and met Surprenant only by doing errands for Coccoaro (fol. 767) and according to his testimony Surprenant spoke to him as if he (McAndrew) was an errand boy and not Coccoaro's confidential man in charge of the financing of Coccoaro's business (fol. 753). McAndrew was never introduced to Cosgrove and did not have any dealing with him and would only be in Coccoaro's office when Cosgrove was there when it was necessary for him to interrupt and consult Coccoaro on other matters (fol. 477). He went to Philadelphia to get the check for the proceeds of the November 8, 1919 notes, it is true, but that was only an errand, and that was after the negotiations between Coccoaro and Cosgrove had been completed.

McAndrew neither signed nor dictated any letters to appellant with reference to the status of the advances of credit (fols. 910-912, 1115, 1119, 1217).

McAndrew's testimony about the alleged conversation with Cosgrove (Cosgrove positively denies having any such conversation with McAndrew, fols. 909-26) is highly improbable.

McAndrew testified that he was trying to get Coccoaro out of Surprenant's clutches, but he emphatically stated, "I cannot tell you personally that

I ever negotiated a loan. I never negotiated a loan" (fol. 775).

McAndrew testified that he never thought Surprenant was Coccoaro's broker, but in an unguarded talkative mood he testified (fol. 773):

"I do know that we borrowed direct from Mr. Surprenant. Mr. Surprenant himself was supposed to negotiate the loans for us, and how he brought it about I personally—I personally don't know. I know there was numerous firms that would tender us various documents, that Coccoaro would sign, and I personally would take them back to the office of A. U. Surprenant, accompanied with cash or checks."

When McAndrew was asked the names of those firms he dodged and dodged and then changed his story. He would only name the two corporations of which Surprenant was officer as concerns besides the respondent that Coccoaro had dealings with through Surprenant.

In *Houghton v. Burden*, 228 U. S., 161, where this court considered similar testimony of witnesses eager to make void a transaction for usury so improbable that it reversed a judgment on a verdict based on it, this court very well says:

"Why should Burden make an agreement to enable him to receive usurious interest, and at the same time make it impossible for him to take such interest without placing him absolutely at the mercy of Canfield?"

There is no pretense that Burden was non compos mentis at the time, and yet it is difficult to believe that any rational being would

have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law, and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, 'void for usury.'

We must assume that Burden is a man of ordinary common sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary, and immediately send the 'combination' to the burglar whom he had most reason to dread (113 C. C. A., 565, 193 Fed., 937).

Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. *Stillman v. Northrup*, 109 N. Y., 473, 478, 17 N. E., 379; *White v. Benjamin*, 138 N. Y., 623, 624, 33 N. E., 1037. In the case last cited it was said:

'Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence.'

Judge Hough of the Circuit Court of Appeals, Second Circuit in *Re Fishel Nessler & Co.* (192 Fed., 413), says:

"Considering the attitude of most states and countries on this subject, the New York act seems archaic, but that can make no difference in the duty of courts. Since, however, in order to reveal usury, it may be necessary by oral evidence to prove the falsity of paper contracts fair and legal on their face, experience has shown that the statute contains a temptation to rascally borrowers to avoid payment of just debts by offering usury as a defense. On this knowledge of human weakness are founded certain rules of decision—judge made but long since established beyond cavil.

Thus the burden is on him who alleges usury to prove it by clear and satisfactory evidence—the offense is largely one of intent—and the unlawful usance must be given and retained in pursuance of an agreement, mutual and existing at the inception of the transaction (citing cases).

It also happens not infrequently that the lender does more than merely hire out his money, and for such additional service he is entitled to be paid, if the service be actual, and whatever objection there may be to his rate of charge, it cannot be based upon the usury statute, unless the whole transaction is plainly but a cover for unlawful lending (citing cases).

But if, when all the evidence and explanations have been considered, it clearly appears that all the lender did or expected to do was to loan, and all the borrower got or expected to get, was money, then any word or phrase, any collateral or contemporaneous agreement by virtue of which more than the amount of the lawful rate flows into the pockets of the lender,

must and should be swept aside, and the intended and agreed upon usury denounced (citing case)."

We come now to discuss the advertisement referred to in petitioners' brief (pp. 3 and 15). Petitioners seek to make it appear that the respondent inserted this advertisement in a public journal, and that as a result the parties began negotiations which resulted in the transactions in question here. Similarly, the petitioners seek to have it appear that the transactions in question were the first between the parties, and that the methods of the respondent were for the first time discussed between the borrower and the lender. It was necessary for them to do this, so as to make the dummy McAndrew, the important person in the picture. But the facts were quite different. There is no evidence in the case whatsoever, that Coccoaro or McAndrew ever saw the advertisement, or that it had any connection with the negotiations which resulted in the first of the transactions between the parties. On the contrary, the evidence showed that the first dealings between respondent and Coccoaro were brought about through Coccoaro's agent, Surprenant. Further, the transaction in question here with which McAndrew claims so important a part, was not the first transaction between the parties.

So too, the petitioners discuss the advertisement as if it read just, "Time Loans on merchandise," but it does not so read. It reads "Time loans on merchandise in any responsible warehouse at $\frac{1}{4}\%$ per month over lowest rate *for best commercial paper*" (italics are ours)—a very different reading from that discussed by the petitioners. We submit that any intelligent business man would understand

its old fashioned abrupt ten-word-telegram in the sense that it was meant, namely, that a merchant having suitable merchandise could by pledging it obtain the best commercial paper payable in the future, upon which he in turn could procure money and that the expense to him would be $\frac{1}{4}$ of 1 per cent. per month over the expense of meeting the paper when due and the expense of selling it.

The petitioners assert that they see no difference between a delivery of a promissory note and the delivery of a check, while they admit that had the respondent endorsed or guaranteed the payment of the promissory note of Coccaro & Co., the transaction would have been a perfectly valid one.

There is no difference in principle between endorsing a promissory note upon the maker's promise contained in a promissory note itself to pay it when due, and to pay for such endorsement or guarantee (which petitioners concede was legal), and the giving of a promissory note upon a promise contained in a separate paper to deposit with the maker of the note the amount necessary to meet it in full and to pay for the issuance of such promissory note, which was the precedent followed in the instant case.

In the one case the person receiving the accommodation says: "If you will endorse or guarantee my promissory note payable two months from date, so that I may raise funds by selling it, I will pay $\frac{1}{4}$ of 1% of its face amount." That endorsement or guarantee the petitioners admit is a sale of credit for which the person so selling the credit may charge any amount agreed upon. In the other case, the person receiving the accommodation says: "If you will give me your promissory note payable two months from date, so that I may raise funds by selling it, I will place in your hands at or before the

maturity of your promissory note the sum which you in your promissory note agree to pay and will also pay you $\frac{1}{4}$ of 1 % of such sum for issuing such promissory note." This latter transaction, the petitioners, for the purpose of their case, assert is a loan of money.

The Circuit Court of Appeals very correctly states:

"The courts have long recognized the difference between a lending or sale of credit and the lending of money and have repeatedly held that for a lending or sale of credit any price demanded may be paid by the borrower without subjecting the contract to the taint of usury" (citing cases).

The Circuit Court of Appeals correctly found that the transactions between the respondent and Coccoaro & Co. were exactly as represented by the respondent, and that there was no evidence adduced by the petitioners to impeach the respondent's proof. Corrupt intent is an essential element of usury. But here there was no evidence of any corrupt intent on the part of the respondent to exact usurious interest from Coccoaro & Co. upon the loan of credit, and there was no evidence to show that the actual transaction was other than as shown by the respondent's oral and documentary evidence, a sale of credit. Every note delivered to S. B. Lewis & Co. was actually sold by S. B. Lewis & Co. to a banking institution and actually delivered to the purchaser. (See S. B. Lewis & Co.'s copies of bills to the various purchasers of the note and the endorsements upon those various notes showing the actual possession of those various notes by their respective purchasers.) Plaintiff's Exhibit 46-c,

fol. 1285-1301; 41-D, fol. 1183-1197; 24, fol. 1087-89; 31, fol. 1105-1110.) In no case did the respondent receive more than 3 per cent. per annum in payment for its advances of credit.

The case of *Richter & Cowgill Co. v. Philadelphia Warehouse Co.*, 99 Pa. St., 289, referred to above was in essence almost identical with the case at bar. The court there said:

"If the testimony tended to prove that the transaction between the parties was merely a cloak for usury, and not a bona fide contract for the storage and sale of goods, to secure the loan in question, it must be conceded the jury should have been permitted to consider and pass upon the question of that presented by the plaintiff's first and second points (the first point being the one quoted above) but we fail to discover, in the provisions of the contract itself, or in the facts and circumstances connected therewith, from its inception to its completion, anything from which the jury would have been justified in finding that it was, in substance and effect, a loan of money at an usurious rate of interest.

There is not a scintilla of evidence that the Thirty dollars was paid for any other purpose than that expressed in the agreement, and in the absence of proof, neither court nor jury had a right to presume it was intended for anything else. * * * The learned Judge was clearly right in saying that no question of usury could arise out of the discount, or the payment of Thirty dollars for services, responsibility," etc.

The petitioners profess to find a difference between the *Richter* case and the present case and

assert that the Pennsylvania Court decided in favor of the Philadelphia Warehouse Co., in the Righter case only because proof was shown in that case of actual services rendered with reference to the collateral. An examination of that case will show that the pledge contract there in evidence is to all intent and purposes identical with the pledge contract in evidence in the case at bar and that it reads, "receiving \$30.00 for their responsibility and services as above and loan of their credit (referring to Philadelphia Warehouse Co.)" The petitioners seek to show that in this case, no services were rendered by the Philadelphia Warehouse Co. The evidence, however, shows that Cosgrove, its Secretary, came on from Philadelphia at Coccaro's request and met Coccaro in New York and that he inspected and appraised the merchandise and in this case received from Coccaro a negotiable bill of lading, which the respondent sent from its Philadelphia office to the Yorke Warehouse, in New York City, and had that warehouse obtain the salmon from the railroad, cart it to the warehouse and issue a non-negotiable warehouse receipt to the respondent and that the respondent secured from A. J. Coccaro & Co. insurance upon the salmon.

In addition to the cases cited by the Circuit Court of Appeals as authorities that any price may be asked for the sale of credit without subjecting the contract to the taint of usury, the following may be considered:

Forgotston v. McKeon, 14 App. Div., 342;
Ketchum v. Barber, 4 Hill, 224;
Palmer v. Jones, 69 Hun, 240;
Elwell v. Chamberlain, 31 N. Y., 611;
Orvis v. Curtiss, 157 N. Y., 657.

The comment of the petitioners that the decision in *Title Guaranty & Surety Company v. Klein* cited by Circuit Court of Appeals could not be considered an authority in this case for the reason that while United States bonds fluctuate, the paper of the respondent, a comparatively small business corporation, does not fluctuate, is too fatuous for discussion.

The court below rightly set aside a verdict which was supported by no evidence whatsoever, and which was the plain result of the trial judge permitting a jury to speculate and surmise on inferences and suspicions, and not on facts, and to find a verdict of usury in a case where the plaintiff neither exacted, nor received, directly or indirectly more than at the rate of three per cent. per annum.

POINT II.

The decision of the court below did not overrule the case of *Hooley v. Talcott* or the case of *Andrews v. Pond*.

The *Hooley* case, 129 App. Div., 233, established no new interpretation of the law of the State of New York on the subject of usury. It merely held that in each case the whole facts and circumstances would be looked into in order to ascertain where the contract was made, so as to determine the law of the State to be applied. The decision below in no manner overruled or overlooked the principles, if any, to be found in the *Hooley* case. An examination of the facts of that case discloses how little bearing the decision could have in the instant case.

The court's attention is called to the fact that the quotations on pages 19 and 20 of the Petitioners' Brief are from the opinion of the New York Appellate Division in the Talcott case (129 App. Div., 236, 240) and not from the charge of the trial judge in the case at bar.

The Circuit Court of Appeals in the case at bar properly held that the contract in question was a unilateral one; and that the offer made by Coccoaro in New York ripened into a contract only when the respondent issued its note in Philadelphia, where every act of importance in connection with the transaction was to be bona fide performed. Accordingly, the court below correctly held that the contract was not only made in Pennsylvania, but was to be performed there as well. This in no manner overrules or conflicts with this court's decision in the case of *Andrews v. Pond*, 38 U. S., 65.

Ringer v. Virgin Timber Co., 213 Fed., 1001;

Cutler v. Wright, 22 N. Y., 472.

The case of *Kurtz v. Doerr*, 180 N. Y., 88, quoted by the petitioners on the subject of the weight to be given evidence in an action where usury is set up as a defense was decided in 1904, while the case of *Houghton v. Burden*, 228 U. S., 161, quoted above, was decided by this court in 1913.

POINT III.

The petitioners claim that their rights under Section 1011 of the Revised Statutes have been violated, is without foundation.

This court well says in *Baltimore & Ohio Railroad Co. v. Groeger*, 266 U. S., 52:

"The creditability of witnesses, the weight and probative force of evidence are to be determined by the jury, and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

It is well established that a party who has moved for a directed verdict prior to the submission of the case to the jury and who has taken an exception to the trial court's refusal of that motion, if there was no evidence that justified the jury in bringing in a verdict in favor of the other party, is entitled to have that contrary verdict of the jury set aside, because a refusal of the trial court to direct a verdict under such circumstances is an error of law and not an error of fact.

As shown above, there is no evidence in this case to justify a finding that the respondent exacted usury from Cocco & Co. The refusal of the trial court to grant the respondent's motion to strike out the affirmative defense of usury and to direct a verdict in favor of the respondent (fols. 954, 973) was an error of law and not of fact and the judgment entered upon the verdict of the jury in favor of the petitioners was properly reversed by the Circuit Court of Appeals, and entirely within its jurisdiction.

Ziang Sung Wan v. U. S., 266 U. S., 580.
Baltimore & Ohio Railroad Co. v. Groeger,
266 U. S., 52.
Southern Pacific v. Pool, 160 U. S., 438.

POINT IV.

The determination of the Circuit Court of Appeals sought to be reviewed by certiorari involves no doubtful question and no question of general interest or importance.

We submit that we have shown that the Court of Appeals correctly decided this case, that all the evidence in this case shows that the transactions between the respondent and Coccoaro & Co., were advances of credit, that the law is now very clear that the usury statutes apply only to loans of money and not to advances of credit, that all the evidence shows that the contract was made in Pennsylvania; that Coccoaro & Co., were to discharge their obligations under the pledge contracts at the home office of the respondent in Philadelphia, Pa.; that such place of performance was not chosen for the purpose of avoiding the law of any state, but simply because it was the logical place for A. J. Coccoaro & Co., to deposit with the respondent the funds necessary to meet the notes issued by the respondent under the pledge contracts and that the law is clear that the place of performance of a contract is the place by the law of which its legality is to be tested.

The fact that so many cases involving the same questions here presented have been decided by this court renders a review in this case absolutely purposeless.

The case of Royal Bank of Canada v. Hills Bros. Co., referred to by petitioners, does not involve a question of usury. It is true that this case grows out of a loan by Royal Bank of Canada to Coccoaro & Co., and is for the conversion of goods pledged by that partnership with that bank, but as we are

advised by the attorneys for the Royal Bank of Canada, the defendants in that case have not pleaded the defense of usury (under the New York law the defense of usury must be affirmatively pleaded) and with their consent we annex hereto a copy of the answer in that case.

CONCLUSION.

The determination of the Circuit Court of Appeals, sought to be reviewed by certiorari, is in all respects correct, and the petition should be denied.

Respectfully submitted,

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Appendix.**SUPREME COURT,
NEW YORK COUNTY.**

THE ROYAL BANK OF CANADA, Plaintiff,	}	Answer.
against		
THE HILLS BROTHERS COMPANY, Defendant.		

Defendant by Breed, Abbott & Morgan, its attorneys, answers the complaint herein as follows:

1. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs "Third" and "Fourth" of the complaint, except the allegation that in the months of January, February and March, 1920, defendant removed from the Yorke Warehouse & Storage Company, Inc., 697-701 Greenwich Street in the Borough of Manhattan, City of New York, certain dried apricots.

2. Denies each and every allegation contained in paragraph "Fifth" of the complaint except the allegation that defendant has failed to surrender any apricots to plaintiff.

3. Denies each and every allegation contained in paragraph "Sixth" of the complaint.

WHEREFORE, defendant demands judgment
dismissing the complaint herein with costs.

BREED, ABBOTT & MORGAN,
Attorneys for Defendant,
Office and Post Office Address,
32 Liberty Street,
Borough of Manhattan,
City of New York.

Office Supreme Court, U. S.
FILED

FEB 25 1927

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 198.

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L.
STIX, CARL SEEMAN and FREDERICK SEE-
MAN, co-partners, doing business under the firm name
and style of SEEMAN BROTHERS,

Petitioners,

against

PHILADELPHIA WAREHOUSE CO.,

Respondent.

BRIEF OF RESPONDENT.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1926.

JOSEPH SEEMAN, SIGEL W. SEEMAN,
SYLVAN L. STIX, CARL SEEMAN and
FREDERICK SEEMAN, co-partners, etc.,

Petitioners,

against

PHILADELPHIA WAREHOUSE Co.,

Respondent.

No. 198.

BRIEF OF RESPONDENT.

Statement.

The respondent brought this action to recover damages for the conversion of 999 cases of canned salmon, title of which was in the respondent under a negotiable bill of lading endorsed to it by the firm of A. J. Coccaro & Co., who later in disregard of such transfer of title to the respondent, sold the goods to the petitioners (R., 2-4). Respondent's title to the goods and their taking by the petitioners having been clearly established at the trial, the petitioners were forced to rely entirely upon the defense of usury claimed to have been exacted by the respondents from A. J. Coccaro & Co. (R., 274, 278). The judgment entered upon the verdict in favor of the petitioners was reversed by the United States Circuit Court of Appeals, Second Circuit. See opinion by Manton, J. (R., 391-8) reported in 7 Fed. (2nd), 999.

The respondent is a Corporation of the State of Pennsylvania, having its only office in Philadelphia, Pa., where it has been carrying on its business since 1871 (R., 69). It was incorporated under a special act of the legislature of Pennsylvania, under which it has been carrying on its business of advancing to merchants its high credit, built on its resources and standing. Its contracts and methods, as pointed out by the court below, had been sanctioned by the highest court of Pennsylvania as far back as 1882 (R., 394, *Righter, Cowgill & Co. v. Philadelphia Warehouse Co.*, 99 Pa. St., 289).

The respondent's regular course of business for many years past has been as follows:

It advances its credit by issuing its own promissory note to a merchant, who pledges with the respondent merchandise to insure that at the maturity of the note the merchant will make provision for its payment. Thus there is placed at the disposal of the pledgor a note which can readily be turned into cash by a sale by the pledgor or by note brokers. In this manner the respondent advances its credit upon merchandise deposited with it as collateral up to a specified percentage of the market value of such merchandise, as determined by the respondent's inspection and by independent appraisal (R., 69, 70-71). The respondent's uniform charge and the actual amount it invariably receives for the issuance of its promissory note against pledge of merchandise in public warehouses, is at the rate of 3% per annum upon the face amount of its note so issued (R., 71). Beyond this charge the respondent neither receives nor exacts additional remuneration, commission or benefit, directly or indirectly (R., 71, 76, 87, 99).

The respondent will deliver its note or notes to the person applying for the advance of credit, to be disposed of as the applicant chooses, or the respondent will, for

the applicant's accommodation and on his written instruction, turn over the note or notes to a note broker for sale by him as agent for the applicant—there are note brokers in Philadelphia who are in touch with many banks and bankers from Maine to California who are accustomed to buying the respondent's notes during the last half century (R., 71). If the applicant chooses to have the note or notes sold through such brokers, the respondent will deliver to the applicant the identical check received from the brokers (R., 71, 85, 142, 147). The respondent prefers to have its notes handled through the Philadelphia brokers, but it does not insist that the notes be sold by the applicant only through those brokers (R., 71). See for example, the two transactions between the respondent and Coccoaro & Co. where its notes were sold to a bank, not one of its own banks of deposit, without the intervention of note brokers and where the respondent returned to Coccoaro & Co. the customary broker's commission paid in advance by Coccoaro & Co. (P. Exs. 35, 37, 41-D-C, 41-F-C; R., 300, 301, 322, 327).

When an advance of credit is made by the respondent, the applicant uniformly signs a printed pledge agreement (P. Ex. 21, R., 284-7). At the same time, the applicant pays to the respondent its commission in advance at the rate of 3% per annum upon the face value of the notes which the respondent is to issue, and also the sum necessary to pay for the internal revenue stamps on the notes. These notes are always issued by the respondent at its office in Philadelphia, where the applicant, by the terms of the printed agreement, is required to make all of his payments (R., 102, 285).

If the applicant desires the respondent's promissory notes to be delivered to him direct, that is done (R., 71). If he wants them sold by the note brokers recommended by the respondent, he signs and delivers to the respondent an order to that effect (P. Ex. 22, R., 287).

It is to be observed that respondent's obligation to the applicant terminates upon the issuance and delivery of its notes—in Philadelphia. In each instance where the respondent, acting for the applicant turns over these notes for sale to a note broker, the money resulting from the sale is remitted by the broker in Philadelphia to the respondent, in Philadelphia, as the applicant's representative who sends to the applicant the identical check so received (P. Ex. 42; R., 142, 327).

When the date of maturity of the note, originally issued by the respondent, arrives, the applicant is under the terms of his contract, obliged to pay to the respondent a sum equivalent to the face value of the note itself (R., 285). If, however, on the due date the applicant is unable or unwilling to make this payment, his inability or unwillingness does not relieve the respondent from the necessity of paying its own promissory note previously sold in the open market. If the applicant performs his contract he pays a sum equivalent to the face amount of the note to the respondent; the respondent is then in funds to meet its own maturing obligation, and the transaction is closed. If, however, the applicant does not do this, the respondent, under the contract, can have recourse to the security. To avoid this latter contingency, a machinery is provided by which, for the convenience of the applicant, the respondent on the written application of the applicant (P. Ex. 30; R., 295), will issue a new note in like sum, which, in turn, will be sold in the open market to supply itself partially with funds to meet its maturing obligation. We say to put itself in funds partially, because, just as in the first instance the original note was sold in the open market at a discount from its face value, so must the second note be sold at whatever rate is then current on the discount market, which may or may not vary from the original discount. When this renewal note is sold, the net proceeds thereof, that is to say, the proceeds less the discount and broker's fees, are paid over to the re-

spondent, and when applied in full to the redemption of its maturing obligation, will leave a balance still to be met. This small balance is supplied by the applicant who, at the time that he requests the further renewal, or, as the parties have termed it, an extension of the advance of credit, pays by his check to the respondent a sum equivalent to the discount, brokerage fees and the Internal Revenue stamps (R., 87).

With these moneys paid to it by the applicant, together with the net proceeds of the sale of the new note, the respondent is placed in possession of funds with which to meet its original obligation then maturing. The original transaction is thus closed, and a new transaction is thus substituted for it. In order to induce the respondent to make this further or new advance of credit, the applicant pays a charge at the rate of 3% per annum on the respondent's new notes on the new transaction. By this operation the respondent performs the same service in this so-called extension as it performed in the original transaction (R., 86-159).

The respondent, each year, issues its notes in these transactions in an amount between \$2,000,000 and \$5,000,000 (R., 251), a substantial part of which was sold by S. B. Lewis & Co., note brokers (R., 163). S. B. Lewis & Co. is a Pennsylvania corporation, specializing in the sale of commercial paper and has its office in Philadelphia. It has been in this business for many years (R., 149). It is a corporation separate and distinct from the respondent and has no relations with the respondent and none of its officers or members are officers or members of the respondent (R., 150). Neither one of the two concerns are interested directly or indirectly in the affairs of the other, or in the profits of the other, or otherwise. S. B. Lewis & Co. keeps the respondent informed of the current market rate at which the respondent's paper can be sold so that its officers and employees can inform applicants (R., 171).

The procedure applied to the instant case.

The procedure with Coccoaro & Co. followed in every particular respondent's regular methods and the printed forms used were those regularly used by the respondent (R., 137)—they were not prepared just for the respondent's dealings with Coccoaro & Co. The title to the goods, for the conversion of which this action was brought, was in the respondent under a negotiable railroad bill of lading endorsed to the respondent by A. J. Coccoaro & Co. on November 18, 1919 (P. Ex. 23, R., 288-291). The goods were pledged on that day by Coccoaro & Co. to the respondent as security for an advance of credit in the sum of \$5,900.00 to be made by the respondent, and under the terms of the pledge agreement to be held as security for other extensions of credit, prior and subsequent (P. Ex. 21, R. 284-287).

The respondent advanced its credit by issuing its promissory note dated November 19, 1919, payable January 20, 1920, which at Coccoaro & Co.'s request were delivered to S. B. Lewis & Co. note brokers (P. Ex. 22, R., 287). The net proceeds of the sale thereof, to wit, \$5,834.20, represented by a cashier's check drawn to the order of the respondent, and immediately endorsed and delivered by the respondent to the First National Bank of Philadelphia, were by that bank at once remitted to Coccoaro & Co. in New York City, at their request by telegraph transfer to their account in the Irving National Bank (P. Ex. 22, 24, 25, 26, 27, 28; R., 287, 291-294). This note was purchased and held by the National Rockland Bank of Boston, Mass., and the rate of discount deducted by that bank was $5\frac{3}{4}\%$ per annum (P. Ex. 24, 46-C; R., 155, 291, 349).

On January 20, 1920, the respondent received from Coccoaro & Co. a request for an extension of this advance of credit and granted such request, issuing two promissory notes for \$2,500 and \$2,400 respectively, dated January

20, 1920, and payable March 23, 1920, which were sold by S. B. Lewis & Co. at an expense of \$69.33. This sum plus \$1.18, cost of internal revenue stamps, and \$30.98, the respondent's commission at 3% per annum, a total of \$101.49, Coccaro & Co. remitted to the respondent with the request for the extension (P. Ex. 31, 32, R., 295-298). At the maturity of these new notes, Coccaro & Co. requested a further extension, which was granted on the payment of \$700 on account, which amount was received the next day. With the request Coccaro & Co. paid the plaintiff the expense of discounting the new note through S. B. Lewis & Co. (\$62.69), the cost of internal revenue stamps \$1.04 and the respondent's commission at the rate of 3% per annum \$26.87 (P. Ex. 36; R., 300). Respondent thereupon issued its new note for \$5,200.00 dated March 23, 1920, payable May 24, 1920. The note was not sold through S. B. Lewis & Co., however, but was discounted by the Centennial National Bank of Philadelphia at the respondent's request, and the charge that S. B. Lewis & Co. would have made was returned by the respondent to Coccaro & Co. (P. Exs. 34, 37; R., 299, 301).

In connection with the advance of credit by the respondent's note of \$5,900, hereinbefore described, A. J. Coccaro & Co., on November 18, 1919, signed the usual pledge agreement pledging to the respondent 1,000 cases of Blue Boy Canned Salmon to secure the respondent for such advance, and other advances of credit already made or which might thereafter be made by the respondent. In token thereof Coccaro & Co. endorsed and delivered to the respondent the negotiable bill of lading for 1,000 cases of Blue Boy Canned Salmon (P. Ex. 21, 23; R., 284-7, 288-91).

The respondent at the request of Coccaro & Co. instructed the Yorke Warehouse & Storage Co., Inc., of New York City, to secure the cases of salmon from the railroad, and store the same in one of its warehouses for the respondent. Thereafter, the respondent received from the

warehouse company a non-negotiable warehouse receipt for the salmon (R., 84; P. Exs. 43-45, R., 328-9; P. Ex. 47, R., 357; P. Ex. 2, R., 280; P. Ex. 19, R., 284, 284a, 284b).

Thereafter, and between February 25, 1920, and March 26, 1920, the petitioners and their assignees removed the said cases of salmon from the warehouses under an order issued to them by Coccaro & Co. on February 18, 1920 (P. Exs. 1, 3-19, 48, R., 279, 279a, 280-4, 284a, 284b, 357; R., 33-6, 145-6, 176-85).

This fraudulent appropriation of respondent's collateral was made possible through the fact (unknown to the respondent, R., 128) that the Yorke Warehouse Co. was owned by Coccaro through stock ownership. Its employees were dummies for Coccaro, and, of course, followed his instructions (R., 24, 40-54). The petitioners were not a party to this fraud.

About the maturity of the last extension of credit, and on May 27, 1920, Coccaro & Co. went into bankruptcy (R., 95).

At the time of the bankruptcy of Coccaro & Co. the firm was indebted to the respondent on six advances of credit, one of these being the credit for \$5,900 furnishing the basis of the controversy in this action (R., 100, 304-6).

After the bankruptcy, respondent proceeded to examine its collateral at the Yorke Warehouse, and discovered that this collateral, together with much other collateral, had been removed (R., 96, 100). Investigation established that the petitioners and their assignees had removed the salmon in question.

The relations of A. U. Surprenant & Co., brokers of New York City, to the transactions in question are of importance to a proper understanding of the situation.

The respondent receives many applications through brokers seeking accommodation for their customers (R., 138). A. U. Surprenant & Co., brokers, brought to the respondent among various applicants, Coccaro & Co. in January, 1918 (R., 70). Surprenant introduced Anthony

J. Coccaro to William P. Cosgrove, the respondent's secretary, in the office of Suprenant & Co. in New York City. At that interview, Cosgrove explained to Coccaro in detail the nature and methods of the respondent's business, and that the respondent would only advance its credit through the issuance of its promissory notes which Coccaro & Co. might sell direct or which might be sold for Coccaro & Co. by note brokers. That conversation resulted in the respondent's making its first advance of credit to Coccaro & Co. (R., 70-2). The advance of credit involved in the case at bar, was a subsequent advance; not the first. This becomes important in view of the testimony of one McAndrew, an employee of Coccaro, which seeks to give the impression that when the advance in question here was made, the terms and basis of the arrangement were novel and unknown to Coccaro.

Coccaro and Co. had to secure financial accommodation from various persons other than the respondent through Suprenant (R., 207-12, 218-21, 358-9).

The relations between Coccaro & Co. and A. U. Suprenant & Co. were very intimate. In October, 1919, they entered into a written agreement under which the latter, for a consideration, were to obtain financial accommodation for Coccaro to finance the purchase of merchandise (D. Ex. F, R., 209-10, 360-364).

The respondent knew nothing about the arrangements between Coccaro & Co. and A. U. Suprenant & Co. (R., 246, 231).

The case was submitted to the jury entirely on the defense of usury, the respondent's motion to strike out that defense and for a directed verdict being overruled (R., 259-63). The verdict of the jury was in favor of the petitioners and the judgment entered thereon has been reversed by the United States Circuit Court of Appeals, Second Circuit, which decided that the evidence did not sustain such verdict, that upon the evidence submitted at

the trial the trial court should have directed a verdict for the respondent because there was no evidence to sustain a finding that the respondent exacted usury from Coccaro & Co. The Circuit Court of Appeals also decided that the submission of the case to the jury on the theory that it was governed by the laws of New York State was erroneous because the evidence showed that it was subject only to the law of Pennsylvania, under which a contract for the payment of more than 6 per cent, interest is not illegal. The opinion is reported in 7 Fed. (2d), 999.

Summary of Argument.

The respondent sold the use of its credit to Coccaro & Co., and the arrangement between the respondent and Coccaro & Co. was not within the prohibition of the usury laws of either New York or Pennsylvania.

Before A. J. Coccaro, on behalf of that firm, signed the pledge agreement covering the canned salmon converted by the petitioners, he was fully informed of the nature of respondent's business; that it did not lend money, but only advanced its credit in the form of its promissory notes; that such notes would be delivered to applicants, or upon their direction delivered to note brokers for sale; that all applicants in addition to paying the respondent its charge of one-fourth of 1% per month for the use of its credit, were required to pay the charges connected with the sale of such notes, including brokerage and discount, and he expressly authorized the respondent to deliver its notes issued under the pledge agreement signed by Coccaro to the note brokers in Philadelphia for sale.

A person to whom an application for a loan has been made may refuse to lend money to the applicant, but offer an advance or sale of credit. If the applicant accepts, the arrangement is a sale of credit and not a loan of money.

There is no distinction between an advance or sale of

credit by endorsing an applicant's promissory note, and an advance or sale of credit by issuing one's own promissory note, which can be sold by or in behalf of the applicant. In either case the purchaser of the note buys it because of his reliance upon the promise to pay of the person extending the credit, whether by endorsement or by its independent note.

The respondent received only one-fourth of 1% per month for the use of its credit by Coccaro & Co.

Even if the transaction be construed as a loan of money, the respondent received from Coccaro & Co. only one-fourth of 1% per month for the accommodation extended by it to Coccaro & Co.—the brokerage charge and the discount, like the money expended for internal revenue stamps, were disbursements that were properly payable by Coccaro & Co.

The pledge agreement was made in the State of Pennsylvania, was to be performed there, and is therefore to be construed according to the laws of Pennsylvania under which only the interest over 6% per annum may be lost to a lender.

The Circuit Court of Appeals properly reversed the judgment of the trial court, because all the evidence, taken together, shows that the transaction between the respondent and Coccaro & Co. was a sale of credit and not a loan of money, and that accordingly the trial court erred in refusing the respondent's motion to strike out the defense of usury and to direct a verdict in favor of the respondent. Such error was an error of law that was properly reviewed and corrected by the Circuit Court of Appeals.

Argument.**POINT I.**

The respondent sold the use of its credit to Coccoaro & Co. and the arrangement between the respondent and Coccoaro & Co. was not within the prohibition of the usury laws of either New York or Pennsylvania.

The 999 cases of canned salmon converted by the petitioners were pledged with the respondent by Coccoaro & Co. under a pledge agreement, the material parts of which are as follows (P. Ex. 21, R., 284-7) :

“Philadelphia, November 18, 1919.

Invoice of Canned Salmon

Consigned to the

PHILADELPHIA WAREHOUSE COMPANY

By A. J. Coccoaro & Co.

1000 cases #1 Tall Pink ‘Blue Boy’ Salmon

4000 doz. @ 2.10 8400

Having deposited with, and confided to the management, custody, and charge of, the PHILADELPHIA WAREHOUSE COMPANY the property belonging to us described in the foregoing invoice, and that Company having advanced its credit to us upon security of said property and upon our warranties herein recited, by delivery to us of its promissory note for Five thousand nine hundred Dollars dated November 18, 1919, payable January 20, 1920, receiving Thirty and 48/100 Dollars as commission for its responsibility and services, as above, and advance of its credit; now, in consideration of said advance, we do hereby promise and agree to and with the said Company that we will pay to it, at its office in the City of Philadelphia, at or

before the maturity of its said promissory note, Five thousand nine hundred Dollars, together with all charges for storage, insurance, and other necessary expenses, including counsel fees, on account of the said property so confided to its management, custody and charge.

And we, the undersigned, do also agree with the said Company to the following terms and conditions as part of this contract: * * *

"3. The property pledged hereunder, together with any heretofore or hereafter pledged by the undersigned to the said Company to secure this or any other liability, general or special shall constitute a general continuing collateral security for all obligations or liabilities of the undersigned to the said Company now existing or hereafter created, contingent, absolute, liquidated or unliquidated, and the said Company's right, title and interest therein shall be prior to all liens or claims thereon, or on the proceeds thereof. And if any property be consigned or delivered to the said Company by the undersigned, either in substitution for property withdrawn or as additional security, such substituted or added collateral shall be subject to all the terms and conditions of this contract, including the maintenance of whatever margin may be stipulated for in case of such property."

The other five pledge agreements mentioned in the testimony and the briefs are similar except as to dates, merchandise pledged, amount of advances of credit and amounts of respondent's commissions (P. Ex. 41-A, R., 307-15).

The pledge agreement distinctly provides that the \$30.48 was paid to the respondent by Coccaro & Co. "as commission for its responsibility and services, as above, and advance of its credit" (R., 285).

Before Anthony J. Coccoaro of the firm of Coccoaro & Co. signed the pledge agreements, Cosgrove, the respondent's secretary, explained to him that the respondent does not loan money but only advances its credit through the instrumentality of promissory notes which the applicant might sell through any one of his own banks, or, if he desired, through a note broker, and that the respondent preferred if the sale was made through a note broker that it be through a Philadelphia note broker acquainted with the market for the respondent's promissory notes (R., 70-1, 130).

In its *prima facie* case the respondent offered in evidence all the documents in its possession and in the possession of S. B. Lewis & Co., note brokers, including the pledge contract (P. Ex. 21; R., 284-7); Coccoaro & Co.'s request to have the note delivered to S. B. Lewis & Co.; (P. Ex. 22; R., 287), the note, endorsed by National Rockland Bank of Boston, Mass. (P. Ex. 24; R., 291); S. B. Lewis & Co.'s report of its sale, a copy of which was sent to Coccoaro & Co. (P. Ex. 25, 28; R., 292, 293-4); S. B. Lewis & Co.'s order on First National Bank of Philadelphia for a check for the net proceeds of the note (P. Ex. 46-B-D; R., 344, fol. 420); S. B. Lewis's bill to National Rockland Bank, the purchaser of the note (P. Ex. 46-C-C&D.; R., 349); S. B. Lewis & Co.'s memo of sale (P. Ex. 46-A-D; R., 331); check of First National Bank for net proceeds of note and letter of the respondent returning it to First National Bank for transfer of net proceeds to Coccoaro & Co. (P. Ex. 26, 27; R., 293); and also similar documents on the extensions, and on the other transactions with Coccoaro & Co.

Recognizing the fact that those documents established the respondent's *prima facie* case and did not disclose any usury, the petitioners offered the testimony of one McAndrews, a former employee of Coccoaro & Co. as their only witness in support of the defense of usury.

His whole testimony must be considered and not simply disjointed portions, and when this is done it will be found that the record does not sustain the contentions of the petitioners.

The fact that McAndrews was called by the petitioners does not of itself establish that his testimony is sufficient to sustain a verdict in favor of the petitioners.

Ziang Sung Wan v. U. S., 266 U. S., 1.

The petitioners claim that McAndrews was Coccaro's confidential man and that he negotiated the series of advances of credit mentioned in the respondent's bill of particulars. Yet he testified (R., 208): "I cannot tell you personally that I ever negotiated a loan. I never negotiated a loan."

He testified that, though he went to Surprenant's office on numerous occasions, he was never introduced to Surprenant by Coccaro and that he met Surprenant only by doing errands for Coccaro (R., 205). According to his own testimony, Surprenant spoke to him as if he were an errand boy and not Coccaro's confidential man in charge of the financing of Coccaro's business (R., 201). He was never introduced to Cosgrove, respondent's secretary and representative (R., 122-3). He went to Philadelphia to get the check for the proceeds of November 8, 1919 notes, but that was after the negotiations between Coccaro and Cosgrove had been completed. He neither signed nor dictated any letter to the respondent with reference to the status of the advances of credit (R., 246-7, 298, 299, 328). He testified that he never thought Surprenant was Coccaro's broker, yet he testified (R., 207): "Mr. Surprenant himself was supposed to negotiate the loans for us, and how he brought it about—I personally do not know." His testimony in respect to the alleged conversation with Cosgrove (unequivocally denied by Cosgrove, R., 246-51) is highly improbable.

In *Houghton v. Burden*, 228 U. S., 161, where this Court considered similar testimony of witnesses eager to make void a transaction so improbable that it reversed a judgment on a verdict based on it, this Court said (pp. 171-2) :

“Why should Burden make an agreement to enable him to receive usurious interest, and at the same time make it impossible for him to take such interest without placing him absolutely at the mercy of Canfield?”

There is no pretense that Burden was non compos mentis at the time, and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law, and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, ‘void for usury.’

We must assume that Burden is a man of ordinary common sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary, and immediately send the ‘combination’ to the burglar whom he had most reason to dread (113 C. C. A., 565, 193 Fed., 937).

Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. *Stillman v. Northrup*, 109 N. Y., 473, 478, 17 N. E., 379; *White v. Benjamin*, 138 N. Y., 623, 624, 33, N. E., 1037. In the case last cited it was said :

'Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence.' "

Further, the transaction with which McAndrew claims so important a part was not the first transaction between Coccaro & Co. and the respondent (R., 70, 250).

There is no difference in principle between paying for the endorsement or guaranty of a promissory note on which the maker is primarily liable (which the petitioners concede is legal), and paying for the use of the endorser's or guarantor's credit, through giving of a promissory note, upon a promise of the borrower of the credit contained in a separate document to meet the note in full. In the one case the person seeking the signature says: "If you will endorse or guarantee my promissory note payable two months from date, so that I may raise funds by selling it, I will pay you $\frac{1}{2}$ of 1% of its face amount." That endorsement or guarantee the petitioners admit is a sale of credit for which the person selling the credit may charge any amount agreed upon. In the other case, the person seeking the promissory note says: "If you will give me your promissory note payable two months from date, so that I may raise funds by selling it, I will place in your hands at or before the maturity of your promissory note the sum which you in your promissory note agree to pay and will also pay you $\frac{1}{2}$ of 1% of such sum for issuing such promissory note." This latter transaction, the petitioners, for the purpose of this case, assert is a loan of money, a contention not sustained by reason or authority.

The Circuit Court of Appeals correctly found that these transactions constituted sales of credit, were exactly as represented by the respondent, and that there was no evidence adduced by the petitioners to impeach the respondent's proof. Corrupt intent is an essential element of usury. But here there is no evidence of any corrupt in-

tent on the part of the respondent to exact usurious interest. There was no evidence that the actual agreement was other than as shown by the respondent's oral and documentary evidence, a sale of credit. Every note delivered to S. B. Lewis & Co. was actually sold by S. B. Lewis & Co. to a banking institution and actually delivered to the purchaser (P. Ex. 46-C, 41-D, 24, 31; R., 349-56, 318-24, 291, 295-296). *The evidence is uncontradicted that the respondent in no manner participated in or received any part of any sums paid to Lewis or Surprenant. In no case did the respondent receive more than 3% per annum in payment for its advances of credit.*

The Circuit Court of Appeals very correctly says (R., 394-5) :

"The courts have long recognized the difference between a lending or sale of credit and the lending of money, and have repeatedly held that for a lending or sale of credit any price demanded may be paid by the borrower without subjecting the contract to the taint of usury. (Ryttenburg v. Schefer, 131 Fed., 313; Title Guarantee & Surety Co. v. Klein, 178 Fed., 689; Meeker v. Fiero, 145 N. Y., 165.) In order to taint a loan with usury a corrupt purpose or intent on the part of the person who takes the security to secure an illegal rate of interest for the money or forbearance of money must exist as a fact or in law. There must be a lender and a borrower and it must appear that the real purpose of the negotiations and transaction was, on the one side, to loan money at usurious interest reserved in some form by the contract, and on the other side, to borrow upon the usurious terms dictated by the lender. (Orvis v. Curtiss, 157 N. Y., 657.) Any person is at liberty to sell his credit at whatever price he can get for it, precisely as he is at liberty to sell any other commodity which he may have. If the transaction is in good faith and not a

mere cloak or device for covering a usurious contract, a greater discount may be charged than the prescribed rate of interest without contravening the usury laws. And where usury is interposed as a defense, it must be proved by the party asserting it."

In addition to the cases cited by the Circuit Court of Appeals as authorities for the proposition that any price may be asked for the sale of credit without subjecting the contract to the taint of usury, the following may be considered:

Forgotston v. McKeon, 14 N. Y. App. Div., 342;
Ketchum v. Barber, 4 Hill. (N. Y.), 224;
Palmer v. Jones, 69 Hun (N. Y.), 240;
Elwell v. Chamberlain, 31 N. Y., 611;
Orvis v. Curtiss, 157 N. Y., 657.

POINT II.

Even if construed as loans of money, and not as sales of credit, no usury was exacted or paid.

As shown in Point I, the respondent did not receive from S. B. Lewis & Co. or the various purchasers of the notes any part of the brokerage or discount deducted on the sales of the various notes.

The amounts paid out by the respondent for Internal Revenue stamps on the various notes; the deductions of S. B. Lewis & Co.'s brokerage charge for selling the notes; and the discounts deducted by the various purchasers of the notes were disbursements that the respondent was entitled to have refunded to it by Coccoaro & Co. and may not be considered additional interest exacted.

Brown v. Robinson, 224 N. Y., 301, 314;
Seamen's Bank v. Fell, 166 N. Y. App. Div., 271;
Houghton v. Burden, 228 U. S., 161;

Matter of Mesibovsky, 200 Fed., 562;
Eaton v. Alger, 2 Keyes, N. Y. Ct. of App., 41;
Thurston v. Cornell, 38 N. Y., 281;
Washburn v. Rider, 2 New York City Ct. Rep.,
 127.

The petitioners contend that the payments made by Coccaro to Surprenant constituted part of the usurious interest exacted by the respondent.

Here the petitioners are again forced to rely on the witness McAndrew for their proof.

McAndrew testified that he never thought Surprenant was Coccaro's broker; but in unguarded talkative mood he testified (R., 207) :

"I do know that we borrowed direct from Mr. Surprenant. Mr. Surprenant himself was supposed to negotiate the loan for us, and how he brought it about I personally—I personally do not know. I know that there was numerous firms that will tender us various documents, that Coccaro would sign and I personally would take them to the offices of A. U. Surprenant, accompanied with cash or checks."

Under cross-examination he testified that Coccaro & Co. had a contract with Surprenant's concern for the raising of money, and a study of that contract (D. Ex. F; R., 208-10, R., 361-364) showed the very large interest of Surprenant's concern in Coccaro & Co., and that Surprenant's concern was the general broker of Coccaro & Co. for the obtaining of loans. Surprenant was the broker who brought Coccaro to the respondent and through him each transaction with Coccaro & Co. was initiated (R., 70, 72). As Surprenant was Coccaro's agent and broker, the amount paid him as commission by Coccaro may not be considered as part of the compensation received by the respondent.

POINT III.

Assuming, for the purpose of the argument, that the transactions in question constituted "loans" of money and not sales or advances of credit, the law of Pennsylvania, governed.

- Clark v. Belt*, 223 Fed. Rep., 573;
Opdyke v. Merwin, 13 Hun N. Y., 401;
Tilden v. Blair, 88 U. S., 241;
Winch v. Farmers' Loan & Trust Co., 11 N. Y. Misc., 390;
Huber v. D'Esterre, 180 N. Y. App. Div., 220;
Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. Rep., 491;
Brower v. Life Insurance Co. of Va., 86 Fed. Rep., 748;
Ringer v. Virgin Timber Co., 213 Fed. Rep., 1001;
Coghlan v. South Carolina R. Co., 142 U. S., 101;
Central Bank of Washington v. Hume, 128 U. S., 195;
New England Oil Corp. v. Island Oil Marketing Corp., 288 Fed., 967;
Cutler v. Wright, 22 N. Y., 472;
Dickenson v. Edwards, 77 N. Y., 573;
Jewell v. Wright, 30 N. Y., 259.

The pledge agreement was dated in Philadelphia and drawn there. The extensions were procured by written applications delivered in Philadelphia. The contract was a unilateral one; in fact it did not become a contract under its terms until the respondent made the next move after the pledge agreement was signed, by the issuance of its note. That was done, not in New York, but in Philadelphia. The pledge agreement provided that the applicant was obligated to make his payments to the respondent in Philadelphia. In each case respondent deliv-

ered its notes in Philadelphia to note brokers designated by Coccaro. Its duty under the agreement ended when it issued its note, and, in any event, when it undertook, as agent for the applicant, to deliver its note to the note brokers for sale. It cannot be inferred (there is no evidence at all on the point) that the respondent contracted to or was under obligation to see that the proceeds reached New York.

The varied ways in which the proceeds of these notes reached Coccaro quite refute any agreement on the point. On at least one occasion the money was delivered in person to Coccaro's representative in Philadelphia, in others sent by mail to him from Philadelphia, in others by telegraph and in still other instances mailed or telegraphed to Coccaro's bank.

On the other hand, we have the very important fact, that the applicant had the option to receive the note and do with it what he chose, rather than to have it sold through notebrokers in Philadelphia.

The case of *Hooley v. Talcott* (129 N. Y. App. Div., 233), cited in the respondent's brief, pages 22, 29, is clearly distinguishable from the case at bar.

In that case, the lender resided in New York State, and all transactions between the lender and the borrower who resided in Philadelphia took place in New York, the borrower acting through an agent residing in New York. A loan was made by the lender to the borrower upon notes drawn in blank in Philadelphia and signed there, but completed and delivered in New York. The notes were payable in Philadelphia, the place of residence of the borrower, and not the place of residence of the lender. The lender received two checks from the borrower, one drawn for the amount of the interest upon the respective loans, and the other drawn to the order of the borrower's agent in New York, but endorsed over by that agent to the lender, although the borrower's agent was in no way indebted to the lender. It was apparent that the lender

received both checks as interest upon the respective loans, and that he received it in two amounts for the distinct purpose of avoiding the New York law with reference to usury. The logical place for the payment of the note was certainly the place of business of the lender. All transactions between him and the borrower were had in New York, both in the original loans and the renewals. In no case, was anything done in Philadelphia, except the signing of the notes dated in Philadelphia. *Talcott loaned money to Scherr—he did not sell or lend his credit to Scherr.* The sole question before the New York Appellate Division in that case was whether the New York or Pennsylvania law of usury *applied to Scherr's (the borrower's) notes.*

In the case at bar the situation was quite the reverse.

As we have pointed out earlier in this brief, the history of the transaction shows that there was no attempt to avoid usury by hiding behind the laws of the State of Pennsylvania; but, on the contrary, the transaction was in its important aspects wholly a Pennsylvania transaction, the minor details of which were carried out in New York. The methods followed in this case were not manufactured for the purposes of this transaction but in substance followed the course of procedure used by the respondent for upwards of fifty years. It was a Pennsylvania concern; it was transacting its business there; it was advancing its credit there; and it must follow that the law of Pennsylvania governs.

Under the law and decisions of the State of Pennsylvania, a contract for a loan or use of money, which calls for a rate of interest in excess of six per cent, per annum, is not unlawful and will be enforced in the State of Pennsylvania.

Montague v. McDowell, 99 Pa., 265;

Stayton v. Riddle, 114 Pa., 464;

Marr v. Marr, 110 Pa., 60;

Colvin v. Blymyer, 121 Pa., 582;
Read's Appeal, 126 Pa., 415;
Appeal of Pettis, 126 Pa., 420;
Commonwealth v. Hill, 46 Pa. Sup., 505.

The courts of Pennsylvania would construe the agreement in question here as a Pennsylvania contract.

Campbell v. Hunt, 60 Super. Ct. Pa., 332;
Stuart v. Barry, 60 Super. Ct. Pa., 370;
Stoddard v. Blackman, 60 Super. Ct. Pa., 371;
Stoddard v. Thomas, 60 Super. Ct. Pa., 177.

In *Andrews v. Pond Co.*, 13 Peters, 65, cited in the respondent's brief at pages 11 and 37, it clearly appears that the ten per cent rate charged as exchange was charged without reference to the law of either New York or Alabama, and that the name "exchange" given to the charge was given for the purpose of concealing the fact that the charge was in fact interest, and that the lender was trying to conceal that fact for the purpose of evading the New York law.

Every fact adduced at the trial of this action by oral or written testimony pointed to the conclusion that this transaction was a Pennsylvania transaction, made by a Pennsylvania corporation in the State of Pennsylvania in the regular course of its business, where every important part of the transaction was accomplished; and that only in respect to matters of convenience to the applicant, did anything take place in the State of New York. Any other construction of the agreement and transaction would be clearly contrary to the facts and intentions of the parties.

POINT IV.

Respondent's reply to some of the petitioners' points.

The petitioners seek to make it appear that the respondent inserted an advertisement (D. Ex. H; R., 364) in a newspaper and that as a result Coccoaro & Co. began negotiations terminating in the transactions in question here and that these were the first transactions between them and that the respondents' methods were for the first time discussed because of that advertisement. The facts are different. There is no evidence that Coccoaro or McAndrew ever saw the advertisement or that it had any connection with any of the negotiations. McAndrew himself does not mention it. On the contrary, the evidence is clear that Coccoaro first came to the respondent through Coccoaro's agent, Surprenant (R., 70).

The petitioners discuss the advertisement as if it read "Time loans on merchandise." It reads "Time loans on mdse. in any responsible warehouse at $\frac{1}{4}\%$ per month over lowest rate for *best commercial paper* (R., 364; italics are ours)—a very different reading from that discussed by the petitioners. We submit that any intelligent business man would understand the meaning of this advertisement, namely, that a merchant having suitable merchandise in a responsible warehouse could by pledging it obtain the best commercial paper upon which he could in turn procure money at a charge of $\frac{1}{4}$ of 1% per month over the expenses.

The nature of the respondent's arrangements with its patrons and the manner of its performance of them is not, as the petitioners seem to intimate in their brief (p. 12), a new scheme of a corporation organized to maintain warehouses for the storage of merchandise.

The respondent was organized more than fifty years ago to carry on the very business that it is now carrying on (R., 69).

In 1882 a Philadelphia concern, which had obtained from the respondent its promissory note upon the payment of a sum as commission computed at the same rate of interest as the sums paid to the respondent by Cocco & Co. ($\frac{1}{4}$ of 1% per month of the face amount of note issued) attacked the arrangement as usurious, but the highest court of the State of Pennsylvania held that neither the pledge agreement nor the manner in which it was carried out sustained the claim of usury.

Righter, Cowgill & Co. v. Philadelphia Warehouse Co., 99 Pa. St., 289.

That case was in essence almost identical with the case at bar. The court there said:

"If the testimony tended to prove that the transaction between the parties was merely a cloak for usury, and not a bona fide contract for the storage and sale of goods, to secure the loan in question, it must be conceded the jury should have been permitted to consider and pass upon the question of that presented by the plaintiff's first and second points (the first point being the one quoted above) but we fail to discover, in the provisions of the contract itself, or in the facts and circumstances connected therewith, from its inception to its completion, anything from which the jury would have been justified in finding that it was, in substance and effect, a loan of money at an usurious rate of interest."

* * * * *

"There is not a scintilla of evidence that the Thirty Dollars was paid for any other purpose than that expressed in the agreement, and in the absence of proof, neither court nor jury had a right to presume it was intended for anything else. * * * The learned Judge was clearly right in saying that no question

of usury could arise out of the discount, or the payment of Thirty dollars for services, responsibility," etc.

The petitioners seek to find a difference between the Righter case and the present case and assert that the Pennsylvania court decided in favor of the Philadelphia Warehouse Co. in the Righter case only because proof was given in that case of actual services rendered with reference to the collateral. An examination of that case will show that the pledge agreement there in evidence is to all intent and purposes identical with the pledge agreement in evidence in the case at bar and that it reads "receiving \$30.00 for their responsibility and services as above and loan of their credit" referring to the Philadelphia Warehouse Co. The petitioners assert that in this case no services were rendered by the respondent. The evidence, however, shows that Cosgrove, its secretary, came on from Philadelphia at Coccoaro's request and met Coccoaro in New York; that he inspected and appraised the merchandise and in this case received from Coccoaro a negotiable bill of lading which the respondent sent from its office to the Yorke Warehouse & Storage Co. and had that warehouse obtain the salmon from the railroad, cart it to the warehouse and issue a non-negotiable warehouse receipt to the respondent and that the respondent secured from Coccoaro & Co. insurance upon the salmon (P. Exs. 2, 23, 29, 43; R., 280, 288-91, 294, 328).

The quotation from *Dunham v. Dey*, 13 Johns., 40, in petitioners' brief, page 14, is not apropos to this case. There the court found that from the circumstances of that transaction it was a loan of money, Dey being the endorser of one of a series of short term notes given by a firm pursuant to an arrangement whereby it was to pay Dunham \$9,225 for Dunham's slightly longer term notes totalling \$9,000 (\$9,225 amounting to \$9,000 plus interest at about 12% per annum). In this case Coccoaro & Co.

agreed to pay the respondent only \$5,930.48 for its 62-day note for \$5,900 (\$5,930.48 amounting to \$5,900 plus commission at 3% per annum) under the pledge agreement covering the canned salamon. Coccaro & Co.'s promises under the other pledge agreements were similar—they were to pay the respondent only the amount of the respondent's notes plus commission at 3% per annum (R., 307-15).

In the *Dunham v. Dey* case, Dey did not claim that the amount of the difference between the present value of the Dunham notes and their face amount should be added in as interest paid by the borrower and the court did not have any occasion to express any opinion on such a claim. That is the nature of the petitioners' claim in this case.

Further, the statement quoted was made in 1816, long before the days of modern business with its promissory notes payable at definite dates in the future, and when business and professional people were familiar with "post notes." It was then the custom for a merchant remitting to a creditor at a distance, instead of mailing the creditor a check payable the day of its drawing, to send to the creditor a note payable at a future date, allowing for the time that it would take the mails to carry the note to the creditor and back again to the bank nearest the drawer and "then some."

The case of *Dunham v. Gould*, 16 Johns, 367, cited in the petitioners' brief, page 15, is similar to the Dey case—it relates to a different note of the same series.

The case of *Kaufman v. Schwartz*, 183 N. Y., App. Div., 510, cited in petitioner's brief, page 21, as an authority to the contrary, was decided under a special provision of the New York Banking Law, which limited the total charges made for making loans of \$200 or less, and has no relation at all to the question now before this court.

In *Fowler v. Equitable Trust Company*, 141 U. S., 384, cited in petitioner's brief at same page, the facts were clearly different, for there it appears that the agent to whom the commissions were paid was the agent for the

lender, performing his work without any pay from the lender and under an understanding that he would receive it in the form of commissions from the borrower.

In this case the respondent had no such agent; Cosgrove was and is its salaried secretary, and Coccaro never paid him a single cent in the form of commissions. The payment by Coccaro to Surprenant was made pursuant to an agreement between themselves under which Surprenant was the regular broker of Coccaro in obtaining loans for Coccaro.

Respondent's correction of some of the statements in the petitioners' points.

At page 6 of the petitioners' points is set forth a statement in support of their contention that the respondent exacted from Coccaro & Co. from $21\frac{1}{4}$ per cent. to $23\frac{1}{4}$ per cent. per annum. That statement is not borne out by the evidence.

As stated above, the respondent's commission for the sale of its credit was at the rate of three per cent. per annum.

S. B. Lewis & Co.'s brokerage charge was at the rate of three-quarters of one per cent. per annum—all of the advances of credit and extensions thereof were at the 60-day rate—none of them were at the 90-day rate (P. Exs. 22, 25, 30, 31, 36, 37, 41-B, 41-C; R., 112, 287, 292, 295-297, 300-01, 315-17).

The notes issued on the original transactions of the respondent with Coccaro & Co. were discounted at the following rates:

Notes of	Rates Per Annum
Nov. 8, 1919,	$5\frac{1}{2}\%$ (R., 315-325).
Nov. 12, 1919,	$5\frac{1}{2}\%$ (R., 316, 326-A).
Nov. 18, 1919,	$5\frac{3}{4}\%$ (R., 287, 292, 316, 326-A).
Nov. 31, 1919,	6% (R., 316, 326-A).
Jan. 5, 1920,	6% (R., 316, 326-A).

It was only on the extensions of credit that notes were discounted at more than six per cent. per annum.

Because the later notes were discounted at more than six per cent. does not affect the original transactions.

Williams v. Fitzhugh, 37 N. Y., 444;
Re Fishel, Nessler & Co., 192 Fed., 412.

The petitioners' witness McAndrew had carefully examined Coccaro & Co's books prior to testifying at the trial (R., 195), but he did not testify that in any instance Coccaro & Co. paid Surprenant a commission on extensions of credit made by the respondent. If he had found any entry to justify the claim of the petitioners that Coccaro & Co. paid one per cent. per month throughout the entire time that the extensions of credit ran, McAndrew doubtless would have testified to such fact.

The payments made by Coccaro & Co. to S. B. Lewis & Co. for brokerage, to the various purchasers of the notes for discounts, and to Surprenant & Co. for commissions, were disbursements made by Coccaro & Co. They were not exactions by the respondent.

The respondent knew nothing about the arrangements between Coccaro & Co. and Surprenant & Co. (R., 246, 231).

Coccaro & Co. did not go into bankruptcy because of the charges and expenses in the transactions with the respondent as alleged in the petitioners' brief (pp. 6-7). Surprenant was their general broker for raising money for their benefit (R., 207 P. Ex. F, R., 360-364), and they paid him heavy charges on many transactions other than the ones with the respondent (P. Exs. 50-51; R., 358). The fact is that Coccaro & Co. borrowed to the limit on all goods from each of two firms or banks and sold the goods to a third concern.

On page 7 of the petitioners' brief, it is stated that the respondent issued its notes to its own note-broker, and the

phrasing of their statement is apt to cause the impression that the issuing of the notes took place in New York. S. B. Lewis & Co. were note-brokers with offices in Philadelphia, not in New York, and while they were recommended by the respondent to Coccoaro & Co., the notes were delivered to them for sale on the orders of Coccoaro & Co. and they thus were Coccoaro & Co's note-brokers in the transactions here in question. The evidence clearly shows that the notes were issued by the respondent at its office in Philadelphia and were delivered to S. B. Lewis & Co. at Philadelphia, and also that S. B. Lewis & Co. and the respondent are two entirely separate corporations (R., 150, 159).

On page 9 of the petitioners' brief, it is stated that S. B. Lewis & Co. bought the respondent's notes. The evidence clearly establishes that such was not the case; that S. B. Lewis & Co. were note-brokers; and that they, as to each of the respondent's notes, acted as agents, not as principals. The notes were purchased by the banks that later endorsed them (P. Ex. 46-C; R., 349-56).

On page 28 (Item 12) it is stated in the petitioners' brief that Cosgrove made complete investigation in New York City as to the valuation of the merchandise pledged by Coccoaro & Co. The evidence does not support that contention. It shows that the respondent's office was in Philadelphia, and that its officers and employees were there, and that the respondent made independent inquiry in the trade as to all merchandise pledged with it. Cosgrove did not state that he made the independent inquiry in New York City.

The petitioners in their brief argue that the monies received on the discount of the promissory notes of the respondent issued immediately after the signing of the different pledge agreements were under its control until they reached Coccoaro & Co. in New York City.

The record shows that that is not so. The identical check received by the respondent remitting the proceeds of the advance of credit of November 8, 1919, was deliv-

ered to McAndrew, Coccoaro's messenger, in Philadelphia (R., 191, 315, 325). The identical check received by the respondent remitting the proceeds of the advance of credit of November 12, 1919, was mailed at Philadelphia by the respondent to Coccoaro (R., 316). The identical checks received by the respondent remitting the proceeds of the two advances of credit of November 18, 1919, were delivered to the First National Bank, Philadelphia, with directions that the amounts be telephoned or telegraphed at once to the Irving National Bank, New York, to the credit of Coccoaro (R., 294). The identical checks received by the respondent remitting the proceeds of the advances of credit of December 31, 1919, and January 5, 1920, were mailed at Philadelphia by the respondent to Coccoaro (R., 316).

The respondent, acting as agent for Coccoaro & Co., had the monies sent to Coccoaro & Co., as stated, at that firm's special request.

POINT V.

The Circuit Court of Appeals properly reversed the judgment of the trial court.

Section 879 of the Judiciary Code, was not violated by the Circuit Court of Appeals in its reversal of the judgment of the trial court.

If satisfied that the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict, the Trial Judge had the right and duty to direct a verdict, as a matter of law. Similarly, if he failed to do so, upon a proper exception, the Circuit Court of Appeals was well within its power when it decided that the trial judge should have directed a verdict on the evidence presented at the trial.

The petitioners wholly failed to carry the burden of proof sufficient to overcome the plain language of the written documents. As was said in the case of *Stark v. Bauer*

Cooperage Co., 3 Fed. (2d), 214, 215 (certiorari denied 267 U. S., 604) :

"On both sides the parties were men of large affairs and long experience. As the District Judge says: 'They were highly competent to deal and dealt at arms length.' Plainly, he who would transform this contract into some different one, supposed to lie hidden in all these plain terms, carries a heavy burden."

There was no evidence in this case to justify a finding that the respondent exacted usury from Coccoaro & Co., accordingly the refusal of the trial court to grant the respondent's motion to strike out the affirmative defense of usury and to direct a verdict in favor of the respondent (R., 259, 263) was an error of law, and not of fact and the judgment was properly reversed by the Circuit Court of Appeals.

Ziang Sung Wan v. U. S., 266 U. S., 1;
Baltimore & Ohio Railroad Co. v. Groeger, 266
 U. S., 521;
Southern Pacific v. Pool, 160 U. S., 438.

In *Baltimore & Ohio Railroad Co. v. Groeger* (*supra*), this court said (p. 524) :

"The credibility of witnesses, the weight and probative force of evidence are to be determined by the jury, and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

Having reached the conclusion that the court below should have directed a verdict for the respondent, the Cir-

cuit Court of Appeals found it unnecessary to base its reversal on errors in the admission or rejection of evidence or in the charge of the Trial Judge. The respondent urged many such errors in its assignment of errors and its brief before the Circuit Court of Appeals.

It is submitted, therefore, that this court should in no event reverse the judgment of the Circuit Court of Appeals to the extent of reinstating the judgment of the trial court without passing on these assignments of error not mentioned or apparently considered by the court below.

CONCLUSION.

The determination of the Circuit Court of Appeals is in all respects correct and should be affirmed by this court.

The respondent made a valid sale of its credit to Coccoaro & Co. As security in case Coccoaro & Co. failed to meet their obligations, they pledged with the respondent the goods that were afterward, without its knowledge or consent, turned over to the petitioners.

The petitioners, although innocent, received those goods from Coccoaro.

It has not been seriously questioned in this case that the petitioners could not acquire a good title to goods which were to all intents and purposes wrongfully converted.

Both parties to this litigation were innocent.

The trial judge stated at the opening of his charge (R., 264) :

“Gentlemen of the jury, this is a sad case, and you have got a hard job. It is a sad case, because, under the evidence, somebody has been the victim of a scoundrel, and it is for you to say where the loss has

got to fall. So far as the evidence shows, in a broad sense you have got to choose between two equally innocent victims."

In this situation, the petitioners seek to take advantage of the alleged claim of usury alleged to have been exacted from the wrongdoer. This made it necessary to impugn the character and methods of an old time institution of high credit and standing. This could only be accomplished by going behind the written word and having recourse to inference and suspicion.

We respectfully submit that all the evidence in the case, taken as a whole, demonstrated that the transaction between the respondent and Coccoaro & Co. was exactly what the respondent claimed it to be, and what the written evidence proved it to be, a sale of credit.

The Circuit Court of Appeals properly reversed the judgment of the trial court, which without warrant of law found to the contrary.

Respectfully submitted,

OWEN J. ROBERTS,
CHARLES A. RIEGELMAN,
of Counsel for Respondent.

APPENDIX A.

The following is the Pennsylvania statute with respect to interest rates (Public Law 622, of May 28, 1858) :

1. The lawful rate of interest for the loan or use of money in all cases where no express contract shall have been for a less rate, shall be 6% per annum, and the first and second sections of the article of the act passed March 2, 1723, entitled "An Act to reduce the interest of money from 8 to 6% per annum" be and the same is hereby repealed.
2. When a rate of interest for the loan or use of money exceeding that established by law shall have been reserved or contracted for, the borrower or debtor shall not be required to pay the creditor the excess over the legal rate, and it shall be lawful for such borrower or debtor, at his option, to retain and deduct such excess from the amount of any debt; and in all cases where any borrower or debtor shall heretofore, or hereafter have voluntarily paid the whole debt or sum loaned, together with interest exceeding the lawful rate, no action to recover back any such excess shall be sustained in any court of this commonwealth unless the same shall have been commenced within six months from and after the time of such payment. Provided, always, that nothing in this act shall affect the holders of negotiable paper taken bona fide in the usual course of business.

SUPREME COURT OF THE UNITED STATES.

No. 198.—OCTOBER TERM, 1926.

Joseph Seeman, Sigel W. Seeman, Syl- van L. Stix, et al., Petitioners, vs. Philadelphia Warehouse Co.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
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[May 16, 1927.]

Mr. Justice STONE delivered the opinion of the Court.

Respondent brought suit in the district court for Southern New York to recover for the conversion of a quantity of canned salmon pledged to it as security for a loan. The pledgor, who had fraudulently regained possession, sold the salmon to petitioners. The defense set up was that the transaction between respondent and the pledgor was usurious and therefore void under the law of New York, where the pledgor conducted its business and where petitioners contend the pledge agreement was made.

The trial court charged the jury that the New York law was applicable. The jury returned a verdict for petitioners. The judgment on the verdict was reversed by the court of appeals for the second circuit. 7 Fed. (2d) 999. This Court granted certiorari. 269 U. S. 543.

Respondent is a Pennsylvania corporation having its only office or place of business in Philadelphia. It has an established credit and for many years has engaged in a business which is carried on according to the routine followed in the present case, which respondent contends, results in loans of credit and not of money. To applicants in need of funds it delivers its promissory note, payable to its own order and then endorsed. The applicant in exchange gives the required security—here warehouse receipts for the salmon—and a pledge agreement by which he undertakes to pay the amount of the note at maturity to respondent at its office in Philadelphia, and agrees that the collateral pledged shall be security for all obligations present and prospective. At the

same time the applicant pays to respondent a "commission" for its "services" and for the "advance of its credit" computed at the rate of 3 per cent. per annum on the face of the note. He is then free to discount the note and to use the proceeds. In practice, as in the present case, respondent usually, with the consent of the borrower, delivers the note to its own note broker in Philadelphia, receives from him the proceeds of the note less discount and brokerage, and pays or forwards the amount so received to the borrower. At maturity he must pay the face value of the note to respondent or, as was the case here, renew the note by paying a new commission and the amount of the discount on the matured note. On each transaction the applicant thus pays, in addition to the amount of the proceeds of the note, the commission and the discount. Respondent, after taking up its note, retains the commission alone as the net compensation for its part in the transaction. In addition, the applicant may, as was the case here, pay the fees of the note broker and the fee or compensation of a loan broker, acting as intermediary in securing the accommodation by respondent, a total amount far exceeding 6 per cent., the legal rate of interest in New York. The commission and discount paid here varied from $8\frac{1}{2}$ to $10\frac{1}{2}$ per cent. per annum of the face amount of the notes, taking no account of fees paid to brokers.

In Pennsylvania, the exaction of interest on loans of money in excess of 6 per cent., the lawful rate, does not invalidate the entire transaction, but excess interest may be recovered by the borrower. Penn. Stat. 1920, §§ 12491, 12492; *Montague v. McDowell*, 99 Pa. St. 265, 269; *Stayton v. Riddle*, 114 Pa. St. 464, 469; *Marr v. Marr*, 110 Pa. St. 60. The business carried on by respondent as described, was considered and upheld by the Supreme Court of Pennsylvania as not usurious in *Righter, Cowgill & Co. v. Philadelphia Warehouse Co.*, 99 Pa. St. 289.

To avoid the application of the Pennsylvania law to the present transaction and others for which the salmon was held as security, and to bring them within the prohibition of the New York law, petitioners at the trial relied on evidence that preliminary negotiations were had in New York City between the pledgor and the agent of respondent from which it might be inferred that the agreement was in fact made there, although the formal documents were dated at Philadelphia and respondent actually executed its note and delivered it to the note broker there. Petitioners also relied on the

special circumstances of the case, particularly the fact that respondent itself procured the proceeds of the note in Philadelphia and forwarded them to the borrower in New York, as ground for the inference by the jury that the real transaction was a loan of money thinly disguised as a loan or sale of credit. As the total amount paid to respondent included both the discount and the commission, aggregating more than the legal rate of interest, it is insisted that these charges, if for a loan of money, were usurious, even though respondent retained only the commission after satisfying the demands of the discounting banks.

The court below held that there was no evidence that the transaction was other than that of its form, a loan of credit; that the agreement between the lender and the borrower was completed only when the respondent delivered its note to the broker in Philadelphia and that the agreement must therefore be regarded as a Pennsylvania contract valid under the law of that state; and that in any case, as Philadelphia, by the express terms of the contract, was made the place of payment by the borrower, the legality of the transaction must be determined by the law of Pennsylvania and not of New York.

But in the view we take, we think it immaterial whether the contract was entered into in New York or Pennsylvania and it may be assumed for the purposes of our decision that the jury might have found that in fact the parties stipulated for a loan of money rather than of credit.¹ Respondent, a Pennsylvania corporation having its place of business in Philadelphia, could legitimately lend funds outside the state and stipulate for repayment in Pennsylvania in accordance with its laws and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state where a different law and a different rate of interest prevailed. In the federal courts, as was said in *Andrews v. Pond*, 13 Pet. 65, 77-78. "The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the laws of the place of performance,—and if the interest allowed by the laws of the place of performance, is higher than that permitted at

¹See *Forgotsen v McKeon*, 14 App. Div. (N. Y.) 342; *Gilbert v. Warren*, 56 App. Div. 289; *In re Samuel Wilders' Sons*, 133 Fed. 562; *Dry Dock Tank v. American Life Ins. & Trust Co.*, 3 N. Y. 344; *Williams v. Fowler*, 22 How. Prac. 4.

the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury." *Miller v. Tiffany*, 1 Wall. 298; *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 242, 243; see *Junction R. R. v. Bank of Ashland*, 12 Wall. 226, 229; *Peyton v. Heinekin*, 131 U. S. Appendix, ci; cf. *Cromwell v. County of Sac.*, 96 U. S. 51, 62.

In support of a policy of upholding contractual obligations assumed in good faith, this Court has adopted the converse of the rule quoted from *Andrews v. Pond*, *supra*. "If the rate of interest be higher at the place of contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." See *Miller v. Tiffany*, *supra*, 310; *Junction R. R. v. Bank of Ashland*, *supra*, 229; *Cromwell v. County of Sac.*, *supra*, 62; *Wharton, Conflict of Laws*, § 510 h; cf. *Tilden v. Blair*, 21 Wall 241; and see *Cockle v. Flack*, 93 U. S. 344, 347.

A qualification of these rules, as sometimes stated, is that the parties must act in good faith, and that the form of the transaction must not "disguise its real character." See *Miller v. Tiffany*, *supra*, 310. As thus stated, the qualification, if taken too literally, would destroy the rules themselves for they obviously are to be invoked only to save the contract from the operation of the usury laws of the one jurisdiction or the other. The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject. *Wharton*, in his *Conflict of Laws*, § 510 o, in discussing this qualification, says: "Assuming that their real, *bona fide* intention was to fix the situs of the contract at a certain place which has a natural and vital connection with the transaction, the fact that they were actuated in so doing by an intention to obtain a higher rate of interest than is allowable by the situs of some of the other elements of the transaction does not prevent the application of the law allowing the higher rate." See *Van Fleet v. Sledge*, 45 Fed. 743, 752; *Goodrich v. Williams*, 50 Ga. 425, 435; *U. S. Savings & Loan Co. v. Harris*, 113 Fed. 27, 32.

Here respondent, organized and conducting its business in Pennsylvania, was subject to laws of that state and had a legitimate interest in seeking their benefit. The loan contract which stipulated for repayment there and which thus chose that law as governing

its validity cannot be condemned as an evasion of the law of New York which might otherwise be deemed applicable.

Petitioners rely upon the fact that in some instances, in connection with other transactions between respondent and the pledgor, payments on account of amounts due were made by deposits in respondent's account in a New York bank, although the other payments were made in Philadelphia. But we do not think this circumstance standing alone is sufficient to vary the application of the rule. There is no suggestion to be found in the record that in the negotiations preliminary to the signing of the contract or at any other time there was any agreement by the parties that payment should be made other than in accordance with the tenor of the written agreement. The pledgor never did pay the amount of the note involved in the present transaction. It was three times renewed and on each renewal the discount on the maturing note and the commission on the renewal were either paid by the pledgor by check in Philadelphia or deducted there by his authority from the proceeds of the renewal note. The fact that in some instances wholly unexplained such payments were received elsewhere affords no basis for the contention that the written stipulation for payment in Philadelphia was not the real one or that its obligation was waived. If the creditor might have compelled payment in the federal courts in New York, see *Bedford v. Eastern Building & Loan Association, supra*, he could receive payment there of a part of the debt without forfeiting the balance.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.